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FEDERAL COMMUNICATIONS COMMISSION REPORTS

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FEDERAL COMMUNICATIONS COMMISSION

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Commissioner Fogarty's term expired June 30, 1983.
Commissioner Jones resigned May 31, 1983.
Commissioner Sharp's term expired June 30, 1983.
*Sworn in December 2, 1983.

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NOTE: The index to this pamphlet includes alphabetized document titles and other descriptive data accumulated from previous and current issues in this particular volume. Refer to pages shown on the cover of the pamphlet to distinguish which documents are available in this issue.

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Application, Filing

Where an application filed late because air carrier could not provide next day delivery due to grounding at an intermediate stop, "unusual and compelling circumstances" are demonstrated to warrant waiver of Sections 73.3572(c) and 1.227(b) of the Rules.
–Caldwell TV Associates, Ltd.

Applicant, Financial Qualification

Commission overturned Bureau policy which allowed applicants filing the 1977 version of Form 301 to certify their financial qualifications after being designated for hearing, if they had not demonstrated those qualifications under the old form. Hearing applicants which took advantage of this policy must now show their compliance with standards of old form or have financial issues specified against them.
–South Florida B/cing Co. Inc.
BC Docket NO. 82–731

CATV Cross-Ownership

Petition for tax certificate granted for the sale of a Multipoint Distribution System based upon a finding that its operations were technically as well as functionally integrated in large part with a cable system that was sold to promote the Commission's policy against the ownership of a co-located television station and cable system.
–Georgia Cablevision Corporation

Cellular Communications System

Applications for Review of staff actions returning amendments to cellular applications as major granted. Applications granted in part concerning amendments remanded to the Common Carrier Bureau and denied in all other respects.
–Cellular Communications Systems

Channel Assignment

Final rule making order adopted to permit the operation of an increased number of FM broadcast stations. Rule changes were needed to meet the demand for FM broadcast service that could not be satisfied under the present rules. New rules allow Class A stations to operate on all channels, authorize three new classes of stations, and reclassify existing stations, after a period of three years, according to their operating facilities.
–FM Broadcast Stations
BC Docket No. 80–90

Common Carrier

Notice of Proposed Rulemaking adopted proposing a plan for the Commission to monitor the effects of interstate access charges and various rate changes on the availability of local service.
–MTS/WATS Market Structure (Phase IV)
CC Docket No. 78–72

Common Carrier

Petition for declaratory ruling seeking clarification of determination which precludes states from imposing alternative regulatory schemes upon carriers to assure the continued availability of CPE to all subscribers granted to an extent and otherwise denied. Adoption of *Second Computer Inquiry,* 77 FCC 2d 384, preempts application of petitioner's proposal to any carrier subject to structural separation rules.
–NARUC

Common Carrier, Authorization

Memorandum Opinion, Order and Certificate adopted authorizing the Western Union Telegraph Company facilities to provide Teletex service within the United States and between the United States and Germany.
–Western Union Telegraph Co.

Common Carrier, Complaint Against

AT&T's refusal to honor MCI's order for Telepak circuits in 1975 on the basis of customer premises tariff restrictions was unjust, unreasonable and discriminatory in violation of Section 201(b) and 202(a) of the Communications Act and resulted in injury to MCI. Damages assessed. Prejudgement interest awarded on contingency basis.
–MCI v. AT&T
CC Docket No. 81–217

Common Carrier, Customer-provided Equipment

Notice of proposed rulemaking adopted for registration under Part 68 of the Commission's Rules of channel service units for direct connection to Dataphone Digital Service. Order deciding that channel service units are customer-provided equipment under *Computer II.*
–Amendment of Part 68
CC Docket No. 81–216

Common Carrier, Interconnection

AT&T's application for Section 214 authority to offer Basic Packet Switching Service (BPSS) granted, with conditions attached to authorization.
–Basic Packet Switching Service

Common Carrier, Interconnection

(See: Common Carrier, Customer-provided Equipment-*Amendment of Part 68*)

Common Carrier, Interconnection

Notice of Proposed Rulemaking adopted seeking comment on proposed rules and requirements to complement the adoption of access charges in Phase I of this proceeding, and the revised industry structure which will result from implementation of the Modification of Final Judgement in *United States* v. *Am. Tel. and Tel. Co.,* 552 F. Supp. 131 (D.D.C. 1982).
–Market Structure (Phase III)

Common Carrier, Interconnection, Carrier to Carrier

(See: Common Carrier, Authorization-*Western Union Telegraph Co.*)

(See also: Common Carrier, Interconnection-*Market Structure (Phase III)*)

Common Carrier, Interconnection, Customer-Provided Equipment

Commission adopted Notice of Proposed Rulemaking proposing procedures for the detariffing of embedded customer premises equipment owned by the Bell System, independent telephone companies, and record carriers.
–Computer II Implementation
CC Docket No. 81–893

Common Carrier, Joint Use of Facilities
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Common Carrier, Mergers and Acquisitions
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–GTE Corporation & Southern Pacific Co.

Common Carrier, Rates, Charges
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(See also: Common Carrier-MTS/WATS *Market Structure (Phase IV)*)

Common Carrier, Rate or Tariff, Unlawful
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Common Carrier, Rates, Just and Reasonable Charges
(See: Common Carrier, Complaint Against-*MCI v. AT&T*)

Comparative Hearing
Review Board affirms ALJ's grant to FM broadcast applicant who has moderate comparative coverage preference for serving nighttime "white" area. Winning applicant's small attributable ownership interest in local broadcast production company is *de minimis,* and its 50% integration credit with minority ownership enhancement deemed equal to another's 52% credit.
–Golden State B/cing Corp.
BC Docket No. 79–56

Competition, Common Carriers
(See: Common Carrier, Interconnection, Customer-Provided Equipment-*Computer II Implementation*)

Competition, Common Carriers
(See: Common Carrier, Authorization-*Western Union Telegraph Co.*)

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Control, Transfer of, Procedures
Application for assignment of license granted. A violation of Section

310(d) of the Communications Act of 1934, as amended, requiring prior Commission consent to the transfer of control or assignment of a license, was not disqualifying where an application was promptly filed.
–D.H. Overmyer Telecasting Co. Inc.

Cut-off rules
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Deregulation
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Divestitures
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Domestic Public Land Mobile Radio Service
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Employment, Equal Employment Opportunity Rule, Compliance Ordered
Petition to deny certain license renewal applications dismissed and/or denied. Where minorities or women are not present on a licensee's staff in a percentage bearing a reasonable relationship to their presence in the local labor force and the licensee has not made a reasonable effort to recruit and hire minorities and women, appropriate remedial sanctions will be ordered.
–Louisiana/Mississippi B/c Stations

Fairness Doctrine, Controversial Issue of Public Importance
Under the Commission's personal attack rule, broadcaster incurs obligations only when an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, during the discussion of a controversial issue of public importance.
–Eulogio Cardona Beltran

Fairness Doctrine, Personal Attack
(See: Fairness Doctrine, Controversial Issue of Public Importance
–Eulogio Cardona y Beltran)

FCC Forms, See Also Forms
(See: Applicant, Financial Qualification
–South Florida B/cing Co. Inc.)

Financial Qualifications
(See: Applicant, Financial Qualification
–*South Florida B/cing Co. Inc.*)

Financial Qualifications
Applications to construct and launch space stations in Domestic Fixed Satellite Service granted conditioned on demonstration of firm financial qualifications. Proposal consistent with Commission's policies and serves the public interest, convenience and necessity.
–*Advanced Business Communications*

Applications to construct and launch space stations in Domestic Fixed Satellite Service granted conditioned on demonstration of firm financial qualifications. Proposal consistent with Commission's policies and serves the public interest, convenience and necessity.
–*Rainbow Satellite, Inc.*

Applications to construct and launch space stations in Domestic Fixed Satellite Service granted conditioned on demonstration of firm financial qualifications. Proposal consistent with Commission's policies and serves the public interest, convenience and necessity.
–*U.S. Satellite Systems, Inc.*

FM Station, Authorization
(Comparative Hearing-*Golden State B/cing Corp.*)

FM Stations, Class A, B, C
(See: Channel Assignment-*FM Broadcast Stations*)

Frequency Assignment
(See: Channel Assignment-*FM Broadcast Stations*)

Hearing, Necessity for
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–*Peoples B/cing Corporation*
BC Docket No. 78–243

Intervention, Request for Denied
Petitioner to intervene was dilatory—he had four years to participate but declined to do so other than as a witness. He will not at this late stage be permitted to attempt to vindicate his private rights.
–*WKKO, Inc.*
BC Docket No. 82–227

Intervention, Right To
Appellant listener groups had not met the participation requirements of Section 1.223(b). Nevertheless, because of their longstanding interest in the existing station, the Board will permit a supplemental showing of how their intervention as parties could illuminate the issues in the case.

–*GAF B/cing Company, Inc.*
BC Docket No. 82–371

License, Assignment of, By Receiver in Bankruptcy
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License, Assignment of, Involuntary
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License, Assignment of, Procedures
(See: Control, Transfer of, Procedures-*D.H. Overmyer Telecasting Co. Inc.*)

Microwave, Dom. Public Point-to-Point, Technical Requirements
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–*Amendment of Part 94 & 15*
Gen. Docket No. 79–337

Minority Ownership
(See: Comparative Hearing-*Golden State B/cing Corp.*)

Mobile Radio Service, Cellular Applications
(See: Cellular Communications Systems-*Cellular Communications Systems*)

Nighttime Coverage
(See: Comparative Hearing-*Golden State B/cing Corp.*)

Ownership and Management, Integration of
(See: Hearing, Necessity for-*Peoples B/cing Corporation*)

Petition to Deny
(See: Employment, Equal Employment Opportunity Rule, Compliance Ordered-*Louisiana/Mississippi B/c Stations*)

Proceeding Termination
(See: Microwave, Dom. Public Point-to-Point, Technical Requirements-*Amendment of Part 94 & 15*)

Reconsideration, Petition for, Denial of
Petition for reconsideration of Review Board decision, 93 FCC 2d 643, denied. Petitioner essentially reargues the points it previously made.
–*Cannon's Point B/cing Co.*
BC Docket No. 81–306

Petition for reconsideration of *Henry C. Armstrong,* III, FCC 83R-16, 53

RR2d 474 (Rev. Bd. 1983) denied. Petitioner essentially reargues the points previously made before the Board.
–Henry C. Armstrong, III
PR Docket No. 81-826

(See also: Hearing, Necessity for-*Peoples B/cing Corporation*) Reports, Required to be Filed

(See: Common Carrier-*MTS/WATS Market Structure (Phase IV)*

Review by Review Board
(See: Comparative Hearing-*Golden State B/cing Corp.*)

(See also: Hearing, Necessity for-*Peoples B/cing Corporation*)

Satellite Domestic Communications
(See: Financial Qualifications-*Advanced Business Communications*)

Application to construct and launch an additional space station in Domestic Fixed Satellite Service is granted to meet licensees current traffic projections. Proposal is consistent with Commission's policies and serves the public interest, convenience and necessity.
–AT&T Co.

Applications to construct and launch space stations in Domestic Fixed Satellite Service granted to satellite private line carrier. Proposal is consistent with Commission's policies and serves the public interest,
–American Satellite Company

Commission assigns orbital locations for new and previously authorized domestic fixed satellites, modifying previous 1980 plan, 84 FCC 2d 584 (1981). Action results from reduced orbital spacing criteria in the 4/6 GHz and 12/14 GHz bands adopted concurrently in *Report and Order* in CC Docket No. 81–704.
–Domestic Fixed-Satellite Service

Application to construct and launch an additional space station in Domestic Fixed Satellite Service is granted to meet licensees current traffic projections. Proposal is consistent with Commission's policies and serves the public interest, convenience and necessity.
–Hughes Communications, Inc.

(See also: Financial Qualifications-*Rainbow Satellite, Inc.*)

Applications to construct and launch space stations in Domestic Fixed Satellite Service granted conditioned on maintenance of sufficient traffic fill on the RCA American Communications satellite system. Proposal is consistent with Commission's policies and serves the public interest,
–RCA American Communications

Applications to construct and launch space stations in Domestic Fixed Satellite Service granted conditioned on maintenance of sufficient traffic fill on the SBS satellite system. Proposal is consistent with Commission's policies and serves the public interest, convenience and necessity.
–Satellite Business Sytems

Application to construct and launch an additional space station in Domestic Fixed Satellite Service is granted to meet licensees current

traffic projections. Proposal is consistent with Commission's policies and serves the public interest, convenience and necessity.
–*S. Pacific Communications Co.*

(See also: Financial Qualifications-*U.S. Satellite Systems, Inc.*)

Applications to construct and launch space stations in Domestic Fixed Satellite Service is granted to meet licensees current traffic projections. Proposal is consistent with Commission's policies and serves the public interest, convenience and necessity. Previous assignments for Advanced Westar satellites in 86 FCC 2d 196 (1981) are null and void.
–*Western Union Telegraph Co.*

Satellite Launch Authority

(See: Financial Qualifications-*Advanced Business Communications*)

(See also: Satellite Domestic Communications-*AT&T Co.*)

(See also: Satellite Domestic Communications-*American Satellite Co.*)

(See also: Satellite Domestic Communications-*Domestic Fixed-Satellite Service*)

(See also: Satellite Domestic Communications-*Hughes Communications*)

(See also: Financial Qualifications-*Rainbow Satellites, Inc.*)

(See also: Satellite Domestic Communications-*RCA American Communications*)

(See also: Satellite Domestic Communications-*Satellite Business Systems*)

(See also: Satellite Domestic Communications-*S. Pacific Communications Co.*)

(See also: Financial Qualifications-*U.S. Satellite Systems, Inc.*)

(See also: Satellite Domestic Communications-*Western Union Telegraph Co.*)

Satellite Orbit

(See: Financial Qualifications-*Advanced Business Communications*)

(See also: Satellite Domestic Communications-*AT&T Co.*)

(See also: Satellite Domestic Communications-*American Satellite Co.*)

(See also: Satellite Domestic Communications-*Domestic Fixed-Satellite Service*)

(See also: Satellite Domestic Communications-*Hughes Communications*)

(See also: Financial Qualifications-*Rainbow Satellite, Inc.*)

(See also: Satellite Domestic Communications-*RCA American Communications*)

(See also: Satellite Domestic Communications-*Satellite Business Systems*)

(See also: Satellite Domestic Communications-*S. Pacific Communications Co.*)

(See also: Financial Qualifications-*U.S. Satellite System, Inc.*)

(See also: Satellite Domestic Communications-*Western Union Telegraph Co.*)

Station Separation
(See: Channel Assignment-*FM Broadcast Stations*)

Table of Assignments
(See: Channel Assignment-*FM Broadcast Stations*)

Tax Certificates
(See: CATV Cross-Ownership-*Georgia Cablevision Corporation*)

Telephone Equipment, Registration
(See: Common Carrier, Interconnection-*Amendment of Part 68*)

Telex
(See also: Common Carrier, Authorization-*Western Union Telegraph Co.*)

Tariff, Rejection of
(See also: Common Carrier, Interconnection-*Basic Packet Switching Service*)

Financial Qualifications
Satellite Domestic Communications
Satellite Launch Authority
Satellite Orbit

Applications to construct and launch space stations in Domestic Fixed Satellite Service granted conditioned on demonstration of firm financial qualifications. Proposal consistent with Commission's policies and serves the public interest, convenience and necessity.
–*Advanced Business Communications*

FCC 83–187

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of the Applications of ADVANCED BUSINESS COMMUNICATIONS, INC For Authority to Construct, Launch and Operate Space Stations in the Domestic Fixed-Satellite Service	File Nos. 1361-DSS-P/LA-82 1362-DSS-P/LA-82 1363-DSS-P-82

ORDER AND AUTHORIZATION

(Adopted: April 27, 1983 Released: August 3, 1983)

BY THE COMMISSION: COMMISSIONER JONES ABSENT

1. Advanced Business Communications, Inc. (ABCI) has filed applications to construct and operate a new domestic satellite system. ABCI proposes to construct three domestic satellites, and requests authority to launch and operate two of these satellites. The third satellite is to be held in reserve as an on-ground spare. Public notice of these applications was given on April 28, 1982. Comments were filed by American Satellite Company (ASC) and Satellite Business Systems (SBS). For the reasons discussed below, we grant ABCI's applications.

2. ABCI is a new corporation formed specifically to construct, launch and operate the proposed satellite system in the 12;14 GHz bands for common carriage. ABCI holds no other authorizations, permits or licenses from the Commission. The three satellites of the ABCI system will each carry 20 transponders with a bandwidth of 43 MHz, and the satellites will have the capability of providing service

to Alaska and Hawaii. They are designed for an expected mission lifetime of eight years. Construction of the three ABCI satellites is to commence in January 1984. The first launch is planned late in 1986 with the second planned for early 1987. ABCI requests the assignment of orbital locations between 85° and 125° West Longitude. It plans to provide data, video and audio service on a nationwide, as well as, regional basis. The satellites are designed to provide flexibility in geographical coverage by switching individual transmitters aboard the satellites to different spacecraft antenna beams.

3. ABCI estimates the cost of its three satellite system to be $260 million. It offers no evidence, however, of financial commitment for the satellite systems construction beyond the very limited initial contribution of its seven shareholders. It expects to raise the necessary financing subsequent to the Commission's grant but prior to January 1, 1984.

4. The principal objection raised with regard to these applications is that ABCI has completely failed to demonstrate its financial qualifications to operate the proposed satellite system. ASC states that, before being assigned an orbital location, an applicant should be required to demonstrate basic financial qualifications. Alternatively, ASC suggests that an applicant be required to submit proof that a financial institution stands ready irrevocably to commit adequate funding contingent only upon Commission grant of the applications. Under either of these standards, ASC believes that ABCI is manifestly unqualified. ABCI responds that either standard is in practice unreasonable under current economic conditions. Such requirements could exclude new entrants who could stimulate the competitive marketplace in terms of technical and service innovations. Instead of rigorous or traditional financial criteria, the Commission should allow ABCI to demonstrate its qualifications by awarding a construction contract for the satellites within a reasonable period of time. Other issues raised regarding ABCI's technical qualifications and the processing of these applications are fully resolved in the *Report and Order* in CC Docket No. 81–704, FCC 83–184, and *1983 Orbit Assignment Order*, FCC 83–186, both adopted today, and we will not repeat that discussion here.[1]

5. In related actions taken today, we have reduced orbital spacings between domestic satellites in the 4;6 GHz and 12;14 GHz

[1] We believe that this decision, along with our decision in Domestic Fixed Satellite Services, 90 FCC 2d 1 (1982), *recon. denied*, and the Memorandum Opinion and Order, FCC 83-183, adopted today, are fully dispositive of any arguments raised with respect to the processing of these applications. This also includes issues raised concerning the application of our *1980 Processing Order*, 77 FCC 2d 856 (1980), and any potential hearing rights that might be granted under the *Ashbacker Doctrine*. *See* Ashbacker Radio Corporation v. FCC, 326 FCC 2d 327 (1945). Moreover, our *1983 Orbit Assignment Order*, FCC 83–196, resolves all issues raised by the parties relating to particular orbit assignments.

bands so that additional satellites might be accommodated in orbit to satisfy growing demands for domestic satellite services. *See Report and Order, supra.* We are taking these actions to continue the opportunities for initial entry by new companies such as ABCI into the domestic satellite market, as well as to provide for the expansion of existing systems already in place. Under these new criteria, we are able to grant all of the applications in the current processing group under our open entry domestic satellite licensing policies. Thus, we are able to grant them without the need to resort to a comparative hearing. However, we recognize that ABCI has not yet been able to adequately demonstrate full financial qualifications to construct and operate its proposed system. We have also addressed this issue in today's *Report and Order, supra,* and have decided that conditioned grants, rather than denial or evidentiary hearings, will better serve the public interest in the prompt and efficient supply of domestic satellite services in the future. Consequently, we will issue construction and launch authorizations to ABCI conditioned on their demonstrating their full financial qualifications, as set forth in our *Report and Order, supra,* no later than December 31, 1983. In the event that ABCI has not fulfilled this requirement by that date, the authorizations will automatically become null and void.

6. Accordingly, IT IS ORDERED that Application File Nos. 1361-DSS-P/LA-82, 1362-DSS-P/LA-82 and 1363-DSS-P-82 ARE GRANTED and Advanced Business Communications, Inc. IS AUTHORIZED to construct three domestic communication satellites in accordance with the terms, conditions and technical specifications set forth in its applications and the formal instruments of authorization to be issued at a later date.

7. IT IS FURTHER ORDERED that Advanced Business Communications, Inc. IS AUTHORIZED to launch and operate two space stations in the domestic Fixed-Satellite Service in accordance with the *1983 Orbit Assignment Order,* FCC 83-186, adopted today.

8. IT IS FURTHER ORDERED that Advanced Business Communications, Inc. shall comply with all the requirements of the *Report and Order* in CC Docket No. 81–704, FCC 83–184, and *1983 Orbit Assignment Order,* FCC 83–186, both adopted today.

9. IT IS FURTHER ORDERED that these authorizations shall become null and void in the event Advanced Business Communications, Inc. fails to demonstrate its financial qualifications by December 31, 1983 in accordance with the policies and criteria specified in the *Report and Order,* FCC 83–184, adopted today in CC Docket 81–704.

10. IT IS FURTHER ORDERED that, unless extended by the Commission for good cause shown, each of these authorizations shall become null and void in the event the space station is not constructed, launched and successfully placed into operation in accordance with the technical parameters and terms and conditions

of this authorization, and no later than the following dates specified in the applications for these facilities:

	Construction Commenced	*Construction Completed*	*Launch (no later than)*[2]
ABCI I	January 31, 1984	August 31, 1986	December 31, 1986
ABCI II	January 31, 1984	October 31, 1986	February 28, 1987
ABCI III	January 31, 1984	December 31, 1986	(ground spare)

11. IT IS FURTHER ORDERED that the temporary assignment of any orbital location to Advanced Business Communications, Inc. is subject to change by summary order of the Commission on 30 days notice and does not confer any permanent right to the use of the orbitor spectrum. Such a change may be ordered *inter alia* to implement uniform 2° separations, to require colocation of in-orbit satellites in the event of excess spare capacity, or to implement any of the objectives or policies set forth in today's *Report and Order*, FCC 83–184, in CC Docket No. 81–704, or *1983 Orbit Assignment Order*, FCC 83–186. Neither this authorization, nor any right granted by this authorization, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, or by transfer of control of any corporation holding this authorization, to any person except upon application to the Commission and upon a finding by the Commission that the public interest, convenience, and necessity will be served thereby.

12. Advanced Business Communications, Inc. is afforded thirty days from the date of release of our *Report and Order*, *supra*, to decline these authorizations as conditioned. Failure to respond within that period will constitute formal acceptance of the authorizations as conditioned.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

[2] We have specified these dates to quantify the applicant's dates of "late 1986" and "early 1987".

Common Carrier, Customer-provided Equipment
Common Carrier, Interconnection
Dataphone Digital Service, Interstate
Telephone Equipment, Registration of

Notice of proposed rulemaking adopted for registration under Part 68 of the Commission's Rules of channel service units for direct connection to Dataphone Digital Service. Order deciding that channel service units are customer-provided equipment under *Computer II*.
-Amendment of Part 68
CC Docket No. 81-216

FCC 83-268

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matters of	
Petitions Seeking Amendment of Part 68 of the Commission's Rules Concerning Connection of Telephone Equipment, Systems and Protective Apparatus to the Telephone Network	CC Docket No. 81-216 RM-2845 RM-2930 RM-3195 RM-3206
and	RM-3227 RM-3283
Notice of Inquiry into Standards for Inclusion of One and Two-Line Business and Residential Premises Wiring and Party Line Service in Part 68 of the Commission's Rules	RM-3316 RM-3329 RM-3348 RM-3501 RM-3526 RM-3530 RM-4054

THIRD NOTICE OF PROPOSED RULEMAKING

(Adopted: June 2, 1983 Released: June 14, 1983)

BY THE COMMISSION: COMMISSIONER FOGARTY NOT PARTICIPATING.

I. INTRODUCTION

1. By a *Notice of Proposed Rulemaking and Notice of Inquiry* in Docket No. CC 81-216 (NPRM-NOI), 85 FCC 2d 868 (1981), the Commission sought public comment on a number of rulemaking

petitions and on its inquiry into other issues germane to Part 68 of the Commission's rules.[1] Part 68 provides the technical and procedural standards under which direct electrical connection of customer-provided telephone equipment, systems and protective apparatus (in the aggregate "customer premises equipment" or "CPE") may be made to the nationwide network without harm and without a requirement for the interposition of telephone company-provided protective circuit arrangements (PCAs).[2] Part 68, the Commission noted, was developed, among other purposes, to eliminate the discrimination fostered by telephone companies that had required the interposition of telephone company-provided PCAs where customer-provided terminal equipment was directly connected yet did not require such PCAs where comparable telephone company-provided terminal equipment was connected.

2. In the Notice of Proposed Rulemaking (NPRM) portion of the NPRM-NOI proceeding, the Commission considered, among other things, a petition for rulemaking filed by Independent Data Communications Manufacturers Association (IDCMA), RM-3530, which sought amendment of Part 68 of the rules to permit the registration and direct connection of customer-provided equipment to American Telephone and Telegraph Company's (AT&T) Digital Data System [or Dataphone Digital Service] (DDS).[3] DDS is a digital communications service which terminates at the customer's premises in either a telephone company-provided channel service unit (CSU) or data service unit (DSU). The CSU provides a controlled, amplitude balanced interface in a modified bipolar format to the customer's data equipment. It also contains remote loop-back circuitry to test the DDS facilities between the customer's location and the serving telephone company office. The DSU, in contrast, performs all the functions of the CSU and provides bipolar conversion, *i.e.*, proper coding and decoding of signals, timing recovery, synchronous sampling, formatting, and generation and recognition of control signals. AT&T offered both the CSU and DSU in conjunction with the provision of DDS.[4]

3. IDCMA's petition claims that AT&T's requirement for a

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[1] One of these issues involves the inclusion of non-system premises wiring under Part 68. A Second Notice of Proposed Rulemaking and Order (Second Notice), FCC 82–495, released November 12, 1982, proposes such rules and includes the Commission's decision not to expand Part 68 to include party line service.

[2] A PCA is an electronic device that prevents harmful voltages or signals emanating from customer-provided equipment or premises wiring from entering the telephone network.

[3] The remaining rulemaking matters will be resolved in forthcoming Commission orders.

[4] Since IDCMA filed its rulemaking petition, AT&T has unbundled the DSU and offers it as CPE, subject to stock depletion. DDS is now offered with the CSU as the standard "interface." We therefore need only consider IDCMA's petition as it relates to the CSU. (*See* AT&T Tariff No. F.C.C. 271.)

telephone company provided CSU "imposes unreasonable and discriminatory interconnection restrictions upon all DDS subscribers". IDCMA further states that subscribers to DDS "should have the option of providing their own equipment without being forced to use and pay for interposed telephone company-supplied protective arrangements."[5] IDCMA compares the requirement for a CSU with the former requirement for a Data Access Arrangement on the switched analog network,[6] which no longer is required.

4. IDCMA has offered a technical proposal which encompasses specification changes involving power limitations, longitudinal balance and means of standard connection, and grandfathering of equipment presently connected to a DDS line. Equipment registered to meet the proposed specifications would be directly connectible to DDS lines.[7]

5. In the NPRM, the Commission observed that a decision to register CSU-like devices and permit their direct connection to DDS would set a precedent for interconnection with future digital private line or MTS/WATS services. It therefore decided to more closely examine the likelihood of unjust and unreasonable discrimination between customer-provided terminal equipment that includes CSU-like circuitry and telephone company-provided digital services that include the CSU. It also decided to examine the effects that a mandatory telephone company-provided CSU which inherently protects against network harm might have on interconnection and product innovation.

6. To complete the record on these and related issues the Commission asked interested persons to comment on the following questions:

1. Is it necessary from a technical or policy viewpoint for DDS to utilize the CSU? Is there any version of the DDS offering that does not incorporate the CSU, e.g., customer premises to customer premises DDS circuits? Is the CSU generally intended to test the service or just the facilities utilized to provide the service?

2. What is the likelihood that CSU-like devices will be required on other current or future digital service? What is the likely timetable for the introduction of digitization at the customer-loop level, for private line and MTS?

3. Will all future CSU-like devices utilized in conjunction with the services in question 2 inherently provide network protection? Is such protection readily separable from the other functions of these devices?

4. Should CSU-like devices be considered part and parcel of their attendant services? If so, should they be required to rely solely on line-supplied power; and should they be transparent, i.e., offer no modification to the structure of the bit stream passing through them? Under what conditions, if any, should such devices be registrable?

[5] IDCMA Petition at 2.
[6] Id. at 8.
[7] *See* attachment to IDCMA proposal at 1 and 2.

5. On which side of the network interface will the CSU-like device be located? How will its location affect the definition of "demarcation point"?

Pending resolution of these issues, the Commission decided to hold in abeyance disposition of RM-3530 and to consider the CSU to be part and parcel of DDS for purposes of Part 68 registration.

7. While several parties offered comments to these questions, much of what was submitted revisited the arguments raised earlier in response to notice of RM-3530. Nonetheless, these comments, in conjunction with the earlier filings, provide us with an adequate record on which to base our final decisions herein. For the reasons set forth below, we reach the following conclusions: first, that CSUs and CSU-like devices [*see*para. 26] should be accorded the same regulatory treatment as customer-premises equipment (CPE) as set forth in our *Computer II* decision;[8] second, we will offer for public comment rule amendments to Part 68 offered by IDCMA in RM-3530; three, in order to expedite the interconnection of CSU and digital network channel terminating equipment [NCTE] - like devices pending adoption of final rules, we will require AT&T to file appropriate tariff revisions to institute an interim plan specifying reasonable technical standards; and, finally, we will offer for public comment a proposal submitted by AT&T to amend Section 68.3 of the rules to permit an alternative termination circuit for use in 2-wire loop simulator circuits (RM-4054).

II. COMMENTS OF THE PARTIES

8. In the following paragraphs, we summarize the responses of the commenters to the questions raised in the NPRM.

Question 1: Need for the CSU

9. In this question, we asked interested parties to comment on the necessity, from a technical or policy viewpoint, for DDS to utilize the CSU. Further, in order to better understand the options currently available to subscribers, we asked whether DDS could be obtained without the CSU at all. Finally, we asked whether the CSU, to the extent it provides a testing function, is intended to examine the facilities alone, *i.e.*, the loops and spans, or the service, *i.e.*, the overall performance of DDS, including certain circuitry within the CSUs themselves.

10. IDCMA states that it is not necessary that DDS utilize telephone company-provided CSUs. It argues that DDS connections are actually no more than facility links between the customer premises and the Bell hub office, with "limited distance baseband

[8] Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 FCC 2d 384, 439 (1980) (Final Decision), *reconsideration*, 84 FCC 2d 50 (1980), *further reconsideration*, 88 FCC 2d 512 (1981), *aff'd sub nom.* CCIA v. FCC, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, ___ U.S.L.W. ___ (1983).

modems" at the end of these links. (IDCMA Comments at 34) It argues that the "functions performed by the CSU include data transmission and testing functions which have historically been incorporated within customer-provided terminal equipment." IDCMA also argues that the test features of the CSU are "simple and incidental" to the CSU's data transmission function.

11. For its part, AT&T states that the transmit[9] and receive functions[10] of the CSU are essential to meeting the performance standards specified in its DDS Technical Reference PUB 41021.[11] AT&T argues that the CSU provides the customer with a stable interface where there exist variations in local loop facility parameters, and when technological changes occur in the network. (AT&T Comments at 65–66) Moreover, AT&T notes, the remotely activated loop-back testing function of the CSU[12] "is necessary to support the high level of availability of DDS channels" and to reduce the need for maintenance personnel visits to customer locations. (AT&T Comments at 66–67) AT&T concludes that requiring the telephone company to rely on customer-provided CSU-like devices would raise problems with regard to service operation and maintenance. (AT&T Comments at 68)

12. In its reply, IDCMA notes the underlying principle of Part 68—that direct connection to the network should be allowed—and urges that well-established, pro-competitive policies should not be abandoned merely because AT&T voices concern about joint engineering and operational requirements, service guarantees, and remote testing capabilities. Functions of the sort performed by the CSU, states IDCMA, are routinely performed by independently manufactured equipment used on other services, notably the limited distance modems used on local area data channels (LADC). (IDCMA Reply at 21–22) Further in this regard, IDCMA argues that service guarantees are largely due to terminal equipment reliability, which independent manufacturers can produce in the competitive market-

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[9] According to AT&T, in the transmit direction (customer-to-network), the bipolar signal is accepted from the customer via a transformer coupling, is amplitude-controlled, amplified, and transformer coupled to the cable pairs of the local channel. (AT&T Comments at 64–65).

[10] In the receive direction, states AT&T, the signal (from network to customer) is received from the cable pairs via a transformer coupling and applied to an automatic line build-out network (which compensates for variations in cable pair characteristics), is amplified, and amplitude-controlled for transformer coupling to the customer's equipment.

[11] PUB 41021 - Digital Data System Channel Interface Specification, dated March 1973.

[12] AT&T states, "to support remote maintenance activities, the CSU also includes a remotely activated loopback relay. This device, when activated by reverse of DC current on the cable pairs, disconnects the customer signal and connects the receive direction to the transmit direction, so that test signals sent from the telephone company central office (CO) are returned to the CO." (AT&T Comments at 64)

place. In response to AT&T's claim for a need to provide a stable network interface, IDCMA argues that the four-wire access line used to provide DDS is itself a "clearly defined and stable interface." (IDCMA Reply at 23–24)

13. In its reply, AT&T again argues that the CSU is an integral part of the network and therefore is not terminal equipment. AT&T controverts IDCMA's statement with regard to customer testing, stating that where the customer's equipment performs the testing there is no ascertainment of fault responsibility, *i.e.*, it cannot be determined whether the circuit or customer equipment is causing the service failure. (AT&T Reply at 55) AT&T also disagrees with IDCMA's reference to the CSU as a modem, or data set, arguing that the CSU performs a broader range of functions, *viz.*, signal shaping, amplification, and remote loopback testing. (AT&T Reply at 56) AT&T again asserts its position that the "telephone company must have the means to provide, test and restore service based on the known characteristics of the channel equipment it provides and depends on, and it cannot delegate that responsibility to its customers." (AT&T Reply at 57)

14. IBM in its reply suggests that AT&T has not met its burden to demonstrate that the functions of the CSU must be performed by the telephone company. IBM states that independent manufacturers can design and produce CSU-like devices with the same degree of reliability as AT&T, and DDS performance standards can be met just as well through customer-provided equipment. (IBM Reply at 3–4) Computer and Communications Industry Association (CCIA), for its part, views the CSU as a customer premises terminal device that is not an integral part of the network. (CCIA Reply at 2)

15. In its responsive comments, IDCMA asserts that by bundling the CSU as part of the DDS offering that includes a performance guarantee, AT&T is completely foreclosing competition for the CSU. In this regard, IDCMA notes that the DDS tariff excludes customer-provided equipment from AT&T's performance guarantees[13] and argues that the best performance guarantee is a competitive marketplace for CSUs. (IDCMA Responsive Comments at 6) IDCMA also disagrees with AT&T's claim that there are active elements in the office channel unit (OCU)-CSU loop, suggesting instead, at least for low speed DDS, that there is only a local loop with no interposed devices. In its responsive comments, AT&T asserts that IBM's characterization of the CSU as a PCA is incorrect, noting, as before, that the CSU performs additional functions which "are critical to the underlying maintenance and service plan of DDS." (AT&T Responsive Comments at 24–25) AT&T also states that IDCMA and others' arguments concerning the ability of independent manufacturers to

[13] IDCMA refers to AT&T Tariff F.C.C. No. 267, § 2.2.1.

produce CSUs are irrelevant; that service responsibility is the focal issue. (AT&T Responsive Comments at 26)

Questions 2 and 3: Digitization Timetable and Protection

16. In the NPRM, the Commission noted that a determination to view the CSU as an integral part of the DDS offering could set a precedent for all future digital services, with possible impact on interconnection policy generally. NPRM at para. 57. Accordingly, the Commission inquired as to the likelihood of future digital services requiring CSU-like devices, and the likely timetable for the introduction of local loop level digitization. In the event that future network plans call for a fundamental redesign of the CSU and its successors, the Commission also inquired as to the effects any such redesign would have upon the network protection feature currently offered by the CSU.

17. In its comments, AT&T states that the 1.544 Mbps DDS service requires span regenerators and regeneration circuitry in the CSU. Moreover, the high speed CSU (designated model 551A) permits identification of a particular regenerator on the local loop which may have failed, a function AT&T notes is not usually needed for the lower DDS speeds (which uses a model 550A CSU). As to future services, AT&T states that it is likely that CSU-like devices will be necessary, since digital network services generally require similar terminal devices. AT&T introduces "network channel terminating equipment" (NCTE) as a general category of CSU-like devices that among other functions, perform "technical, maintenance, and channel provisioning requirements" for high speed data services. (AT&T Comments at 72)[14] As to the likely timetable for the development of digital customer loops for voiceband services, AT&T states that while the widespread use of digital technology to serve individual customers' station sets is not yet economical, it anticipates deployment of up to 64 kbps digital facilities by 1985, and widespread use by 1990.

18. In its comments on this question, IDCMA defers to the carriers' expectations regarding developing digital services. However, it expresses concern that a Commission decision to view the CSU as an integral part of DDS would impede equipment innovation for those future services. (IDCMA Comments at 35) IDCMA asserts that it makes no technical or economic sense to require a separate box to provide protective functions when both can be incorporated in customer-provided equipment.

19. IBM expresses its concern that inclusion of the CSU in the provision of network service would "result in a return to a modified form of telephone company-provided protective arrangement." IBM also counsels that interfaces to digital communications services

[14] *See* para. 26, *infra*, for further discussion regarding the NCTE.

should encourage maximum freedom of customer-to-carrier interconnection and product innovation, particularly as standards are developed in connection with the Integral Services Digital Network, a new digital communications service concept currently under development both in the United States and abroad. (IBM Reply at 5–6)

20. In its reply, IDCMA dismisses the likelihood of early changes in local loop technology, and urges that the foreseeable future offers no justification for restricting competition in the provision of CSU-like devices. (IDCMA Reply at 25–26)

21. In response to both IBM and IDCMA regarding future CSU-like functions, AT&T states that it "will continue to cooperate with the Commission and the industry in the development and adoption of standard network interfaces for digital services." (AT&T Responsive Comments at 26–27)

Questions 4 and 5: CSU Power and Location

22. Questions 4 and 5 were intended to reveal any effects CSU-like devices might have on the network, the user's data stream, or the Commission's other proceedings, notably the development of the "demarcation point" in this docket. *See Second Notice of Proposed Rulemaking and Order, supra* at n. 1.

23. AT&T indicates that the 550A CSU used for DDS is commercially powered, and the 551A CSU is line powered. With regard to data transparency, AT&T seems to suggest that the CSU may be required to convert the electrical structure of the data bits transmitted through it, *e.g.*, bipolar to unipolar where transmission is by a lightwave facility, and in that sense is not transparent. (AT&T Comments at 74) With respect to logic structure, while the CSU does not convert the code or protocol of data signals, it may be required to convert network-to-user control signals. AT&T states that inherent protection is not necessary characteristic of NCTE generally, though in the case of DDS (*i.e.*, the CSU) it is. Thus, where protection is inherent, it is not separable from the other functions of the device. (AT&T Comments at 75) AT&T concludes that the NCTE must be electrically close to the demarcation point.

24. IDCMA asserts that CSU-like devices should not be required to be line powered. On the matter of transparency, IDCMA argues that the CSU is not transparent, since it contains filters and performs equalizing functions. (IDCMA Comments at 36–37)

III. DISCUSSION

25. Over the course of the last eight years, the Commission has developed, through Part 68 of its rules, a telephone equipment registration program that permits the direct electrical connection of telephone terminal equipment to the nationwide telephone network, including certain private line services, without causing harm to the

network. Underlying Part 68 was the objective of eliminating the discrimination fostered by telephone companies that had required the interposition of their protective arrangements where customer-provided terminal equipment was directly connected yet did not require such protective arrangements where comparable telephone company-provided terminal equipment was connected. Consistent with this objective, IDCMA filed its petition for rulemaking, RM-3530, urging the adoption of rules that would extend the registration program to include equipment connected to DDS. IDCMA's petition raised a threshold concern regarding identification of the interface point between telephone company service and terminal equipment, *i.e.*, whether the CSU is properly part and parcel of the common carrier service offering or whether it is separable and more properly classified as CPE. The questions we offered for public comment, at para 6, *supra*, were directed at developing a better understanding of this issue.

26. As indicated, in this proceeding we are asked to make a generic determination as to whether a CSU device is properly considered part of the common carrier offering or otherwise is within the exclusive control of the carrier. In making such a determination, however, it is clear that we are not merely addressing a specific piece of equipment having the designation of a "channel service unit." AT&T, for example, views the CSU and CSU-like devices as members of the broader family of devices termed "network channel terminating equipment" (NCTE). Thus, while we discuss specific arguments made with regard to CSUs, on the basis of the record herein we see no reason to limit the decision solely to such devices.[15] Our

[15] AT&T has filed a petition for rulemaking to amend Part 68 to permit the direct connection of PBXs or similar systems to DS-1 channels (1.544 Mbps digital channels that use digital NCTE.). In its reply comments in that proceeding, AT&T characterizes the digital NCTE in a manner that leads us to conclude that it is functionally, if not electrically, identical to the CSU. Both the CSU and the digital NCTE contain circuitry that performs signal shaping, amplification and remote loopback testing and, incidentally, network protection. *See* AT&T Reply Comments in RM-4087 at 4; *see also* AT&T Comments on RM-3530 at 73. Also, we note from AT&T's Reply Comments to petitions directed to Transmittal No. 14186 (Revisions to Tariff F.C.C. Nos. 260, 262, 267, 268, 270, 271 and 273 Terrestrial Digital Circuits, or DS-1 Channels) at Attachment A, that the digital NCTE and customer-provided equipment will be required to handle a D4 format for the framing bit position or an Fe format for the framing bit. (*See*AT&T Compatibility Bulletin 142, The Extended Framing Format Interface Specification, dated September 29, 1981.) We note that AT&T plans to provide the Fe format as an optional offering beginning January 1, 1985. (Fe provides certain network efficiency information through the use of compatible terminal equipment and/or network equipment.) There is no indication, however, that the network interface, *i.e.*, levels and wiring configurations, will differ from those currently specified for the CSU; or, if they do, whether such parameters would preclude production of digital network-compatible NCTE by independent manufacturers. The D4 and Fe formats may require changes in the design of digital NCTE devices currently offered. Nevertheless, we do not believe that such changes are affected by, or in

determination in this proceeding encompasses those CSU-like devices that serve the function equivalent of a CSU and which a carrier might seek to provide in conjunction with its offering of digital transmission capacity. Consistent with this, in this order we shall use the terms "CSU", "CSU-like", and "digital NCTE" interchangeably.

27. It is plain from the responses to question 1 that there exists no lack of manufacturing expertise among independent producers to duplicate the CSU. AT&T itself recognizes this, arguing, in essence, that it is system integrity that requires that the CSU remain part of the DDS offering. The majority of the parties commenting agree that a CSU-like device is needed in conjunction with digital services to perform loopback testing and bit regeneration capability. Both of these functions appear to be necessary if rapid, remotely controlled fault location is to be incorporated into the DDS maintenance function. The parties do not agree, however, that system integrity mandates sole telephone company provision of these functions. The focus of our attention, then, is not on whether manufacturers are capable of producing CSU-like devices or whether such devices are desireable, but whether there exist any technical or legal justification for their being provided exclusively by the telephone company, *i.e.*, by the DDS carrier.

28. The legal principle fundamental to telephone network equipment interconnection was enunciated by the Commission in *Hush-A-Phone* [16] and *Carterfone*.[17] It is that the burden of proof rests squarely on the carriers - not the users or this Commission - to demonstrate that a particular unit or class of customer-provided equipment would cause harm to the telephone network. The essential test for this well-established principle, as applied to the case before us, is whether connection of customer-provided CSU-like devices to DDS constitutes use of the network in a way that is privately beneficial without being publicly detrimental. *See Carterfone, supra* at 424. The manufacturers assert that they can produce such CSUs, and AT&T does not controvert the assertion. The benefits of competition in this area, in addition to opening market opportunities to the manufacturer, may lead to the innovation of new terminal equipment features, such as error detection and correction circuitry or the provision of network status or performance data, which could be of considerable benefit to users. The

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themselves affect, the decision we make herein; nothing the parties' responses to our questions 2 and 3 leads us to any other conclusion.

[16] Hush-A-Phone Corp. v. U.S., 99 U.S. App. D.C. 190, 238 F.2d 266 (D.C. Cir. 1956).

[17] Carterfone, 13 FCC 2d 420 (1968), *recon. denied*, 14 FCC 2d 571 (1968).

competitive provision of CSU-like devices will serve to benefit private use of the network - without causing public detriment.[18] In a competitive environment, it is likely that innovation will occur in CSU design. As we noted in *Computer II*, the benefits of a competitive equipment policy have been found in such areas as improved maintenance and reliability, improved installation features including ease of making changes, competitive sources of supply, the option of owning or leasing equipment, and competitive pricing and payment options. *Final Decision*, 77 FCC 2d 384, 439 (1980).

29. Over the years, this Commission has consistently fostered the competitive provision of terminal equipment. The apex of this evolutionary process was our *Computer II* determination that CPE should not be offered as part and parcel of a common carrier offering. Having divorced CPE from the common carrier offering while allowing carriers to provide such equipment on a competitive basis with other equipment vendors, we placed a high threshold burden on a carrier to demonstrate that a particular type of equipment located on the customer's premises should be considered part of a common carrier offering. As discussed below, we conclude that AT&T has not met its burden in this regard and that CSU-like devices should be accorded the same regulatory treatment as any other customer premises equipment, as set forth in our *Computer II* decisions.

30. We now turn to AT&T's argument that customer provision of CSUs will affect performance guarantees associated with DDS, to the detriment of the service offering. Since the CSU is an isolation device, it prevents harmful signals or voltages from subscriber equipment from affecting the DDS line or network. The signal at the input to the CSU from the network should then be the same as that at the telephone company central office, except for occasional errors due to line noise. Present DDS tariffs guarantee a maximum error rate at the CSU output. If the error rate were guaranteed instead at the CSU input, requirements for a maximum error rate could be met regardless of faulty operation of a customer-provided, CSU-like unit; performance standards could be specified at an interface point on the network side of the CSU. Customers providing their own CSUs, which most likely would contain loopback circuitry compatible with network-initiated testing requirements (as discussed below in more detail), would be responsible for telephone company maintenance expenses incurred as a result of faults in those CSUs. For example, if the carrier were testing a DS-1 facility from the central office and could not engage the loopback function of the CSU due to a failure in

[18] Over the last seven years we have seen clear evidence of private benefit without public detriment in the analog network registration program. Some 12,000 devices have been registered by over 1,000 persons.

the customer-provided CSU, the customer would be liable for all maintenance costs associated with isolating that trouble, including the expense for dispatch of a repairperson to the customer's premises to make the final diagnosis. This burden has existed since the Commission's Part 68 program was first instituted. *See Carterfone, supra*, and *First Report and Order* in Docket No. 19528, 56 FCC 2d 593, 596 (1975). The disincentives associated with faulty CSU function likely will assure that devices of lesser quality than models currently in use will not reach the data equipment user. Although we believe that performance guarantees can be a meaningful adjunct to tariffed services, they are no less meaningful when measured at the point of demarcation, *i.e.*, on the network side of the (customer-provided) CSU. Further, if IDCMA's claim that the weak link in digital service is the terminal equipment is correct, the carrier would benefit by being responsible only to that point. It would no longer be responsible for the more common problems of terminal equipment malfunction. AT&T's argument that the functions of the CSU are essential to meeting its DDS tariff performance guarantees[19] seems to support IDCMA's view. It also suggests a design threshold for manufacturers as they develop CSU-like devices for direct connection to DDS facilities. In short, we believe that competition will (1) assure the availability of suitable CSUs, and (2) not affect current tariffed DDS performance guarantees, since such guarantees will be referenced at the demarcation point. Accordingly, we do not believe that performance guarantees warrant control of the loop facilities, OCU (office channel unit), *and* CSU by the telephone company.

31. AT&T suggests that future developments in local loop technology may require changes in terminal equipment design. Such developments are generally instituted with considerable notice in the trade press, and telephone companies are under a continuing obligation to disclose anticipated network changes that affect terminal equipment interconnection. *See* Sections 64.702(d)(2) and 68.110(b) of the rules, which reflect the requirement for notice of network changes that occur either on the network side of CPE or that affect the operation of equipment on the customer's premises. *See* Section 2 of *Modification of Final Judgment Governing the BOCs*, 552 F.Supp. 131, 227 (D.D.C. 1982). Consequently, we do not agree with AT&T's position that CSU changes, in response to network changes, cannot be implemented. We do not intend by our decisions herein to forestall network development or innovation by the carriers. CSU manufacturers and users will bear the risk of all necessary equipment modifications required in response to network changes announced pursuant to Sections 64.702(d) and 68.110(b).

[19] AT&T's Tariff F.C.C. No. 267 guarantees 99.5% error-free seconds of operation at up to 56 kbps and provides for credit allowances for the periods the telephone company requires to complete repairs.

Widespread CSU modifications necessitated by network changes would be no less costly were AT&T to provide the CSU; the costs in equipment changes would be borne directly by the user in this case rather than indirectly through expanded revenue requirements and increased tariff charges. As a practical matter, we would expect that network changes initiated by the telephone company, once implemented, will prove beneficial to users, and the costs to users of revisions to their terminal equipment necessitated by those changes will be minimal in relation to the technical advantages offered thereby. Should future local loop technology require adjustment in our conclusions herein, appropriate regulatory remedies remain available.

32. In addition, AT&T raises what amounts to four basic technical-operational arguments suggested by AT&T that bear on its argument in favor of retention of the CSU as part of the DDS offering: (1) there is an array of tariffed offerings that requires the interposition of a telephone company-provided interface to provide the specified service; (2) there exist facility characteristics so variable from local loop to local loop as to warrant a telephone company-provided device at the termination of the offering in order to standardize the interface parameters; (3) the use of a customer-provided CSU would in some way cause operational harm to the network, or harm to other persons; and (4) remote loopback testing is a feature that must be available for network integrity. In the paragraphs that follow, we will examine each of these arguments.

33. *Signalling and standardization.* While AT&T asserts that a function of the CSU is to provide network termination standardization, there is no showing that DDS (or DS-1, for that matter) is offered at other than one set of predetermined amplitude levels, or that there are signalling options available. There are various data speeds offered which may necessitate equipment adjustment or network conditioning, but the digital offering is provided in a uniform format, with no signalling option or choice of amplitude level.[20] (As we discuss below, such equipment adjustment is generally handled automatically by the terminal equipment, or may be "set" by an installer with the proper test equipment at the time of CSU installation.)

34. DDS signals normally consist of bipolar rectangular pulses. Because of the finite bandwidth of the DDS channel, distortion (primarily phase distortion) is introduced into the signal. Further, because the channel is not perfect, there is external noise pickup and self-generated thermal noise. To compensate, DDS trunks contain circuitry, including regenerators, that amplify, clip and resynchron-

[20] Network conditioning refers to the technical characteristics and capabilities of the network facilities. Conditioning determines, in part, how efficiently terminal equipment will function when used with such facilities.

ize, or reconstruct the signals. These regenerators are spaced at regular intervals on a DDS line. The maximum span between the CSU and the previous regenerator is limited, so that the amount of noise and distortion at the CSU is generally not severe. The CSU alone does not perform all the requirements for coupling of the DDS line to the customer. In the receive (line to customer) direction, the CSU depends upon the fact that in traversing the local loop from the OCU at the central office to the CSU, line distortion and noise are within certain limits. This assures that the signal may be regenerated properly. In the transmit direction, the CSU depends on the customer to derive timing signals from the incoming signals and to provide signals in the proper format and synchronization to the line. If these conditions are not met, the CSU cannot accomplish its intended function. AT&T uses two types of CSU devices. At the lower DDS bit rates (2.4, 4.8, 9.6, and 56 kbps), a model 550A CSU is used. At the higher bit rate of 1.544 Mbps, a model 551A CSU is used. While both perform similar functions, the 551A is a more sophisticated device which performs certain signal monitoring and correction functions in addition to its 550A-like functions. These functions include monitoring of the customer line and inserting pulses when necessary to achieve a specified minimum pulse density. In addition, an active clock recovery circuit allows pulses to be transmitted when no data signal is present. (This prevents oscillation along the span when customer data output ceases.) In addition, the telephone company must assure that the signal delivered to the interface contains no more than a specified level of distortion and noise. In this sense, DDS and other digital offerings do not require a "standardizing" interface, such as the CDQ used in private line tie-line services. *See First Report and Order* in Docket No. CC 79–143, 76 FCC 2d 246 (1980). So long as the arriving bits conform both to the terminator threshold voltage (Vin) specifications (0.35 V and 1.05 V for logic states 1 and 0, respectively) and to the waveform (distortion) limits of the CSU, no "standardization" is needed. *See* AT&T PUB 41021, *supra*.

35. *Loop variations*. As to the matter of variation in loop characteristics, it is apparent that at the lower DDS speeds, *i.e.*, below 1.544 Mbps, the CSU does not utilize regeneration circuitry, nor is there generally a requirement for regeneration equipment in the span between the central office and the customer premises. This certainly tends to show, at least in the lower speed DDS case, that local loops are conditioned adequately to deliver data to the CSU in a form that assures reliable, relatively error-free performance. At the higher DDS speed of 1.544 Mbps, final delivery of reasonably well-shaped waveforms is assured by the inclusion of regenerators in the loop, including a final regenerator within some 2000 feet of the customer's premises. *See* AT&T BSP 314–645–100; and AT&T Technical Reference PUB 41021, *supra*, Attachment E, Items 29–34.

This final regenerator is located relatively close to the customer's equipment in order to prevent significant waveform distortion by extraneous noise sources in riser cables and "noisy" customer environments. While the CSU may require initial adjustment to optimize its compatibility with the local loop to which it is connected, there is no showing that noise or facility anomalies result in regular CSU readjustment or replacement. Indeed, the design of the CSU apparently permits its successful operation in most cases where properly conditioned facilities have been provided. The greater variable seems to be noise (and jitter) within a given loop rather than variation in characteristics from loop to loop, and these faults are generally easily handled by the CSU, whether provided by the telephone company or by an independent manufacturer. In conclusion, it is not evident that there generally exist facility variations justifying interposition of an exclusively telephone company-provided interface.

36. *Harm.* While the CSU is a signal reshaper which restores pulse quality, it has no way of determining if customer signals are properly synchronized or if the proper bipolar format is being generated. (The CSU for 1.544 Mbps service does recognize and correct certain faults, but it cannot compensate for all signal problems. Most faults in customer signals cannot be corrected and do not present the potential for harm to the network.) One possible source of harm might come from high amplitude pulses or voltages emanating from data equipment, creating levels that exceed the specifications of the network interface. But CSUs registered under Part 68 would include means of preventing such pulses or voltages from entering the network. In current designs, components in the reshaping or regeneration circuitry, *viz.*, transformers and varistors, provide that function. Other faults in customer generated signals would most likely cause harm only to the successful transfer of information. There is, then, negligible likelihood of "harm", as defined in Section 68.3(g) of the rules, to telephone service by direct connection of FCC-registered CSUs.

37. There is no suggestion by any party that the power drawn from the line for operation of CSU circuitry is likely to cause harm. We would expect that the standards we develop in this proceeding will include specifications that are analogous to the ringer equivalence number in our existing rules. Parties are invited to offer amendments to the proposals contained in the attached Appendix in this regard.

38. *Loopback testing.* A further argument offered by AT&T concerns its claim of its need to include remote loopback testing within the CSU as a feature of DDS. As discussed earlier, remote loopback testing provides the telephone company with the capability of locating or isolating faults in facilities (including span regenerators). Such capability, AT&T notes, is particularly useful in identi-

fying the source of trouble on a line, which may be in the CSU. Were customer-provided CSUs that do not contain loopback testing capability interconnected, telephone companies could only test: (1) remotely to the regenerator closest to the network-customer demarcation point, or (2) by manual means to the demarcation point.[21] However, as indicated earlier herein, we believe it likely that independent CSU manufacturers will be eager to offer prospective purchasers of CSUs features that enhance system reliability and performance - such as remote loopback testing capability.

39. *Waiver.* As noted previously, we have carefully considered the specific arguments advanced with respect to the CSU and like digital devices and have concluded that, notwithstanding the carriers' arguments in favor of continued supply of such equipment on a regulated basis, there are advantages in favor of unregulated supply of such devices, *i.e.*, treating them no differently than other terminal equipment. Technical and operational concerns have been raised; but, in our view, they are not insurmountable, and, in fact, represent relatively minor problems which can be addressed and solved. Nevertheless, in an abundance of caution we shall seek to create a mechanism by which carriers might, upon an appropriate showing, supply NCTE in conjunction with loop facilities if exigencies exist which have not been demonstrated to be applicable to the CSU devices. We address below the circumstances which, from our present perspective, might justify special treatment of NCTE, and we address the overriding principles which should apply if any such special treatment is sought.

40. While the CSU appears to interface with loop facilities using relatively stable interface parameters, to which other suppliers' CSU devices might similarly be designed on a stable basis, this may not be the case with all other NCTE equipment. We are aware that there may be variability among loops, and that in such circumstances supply of NCTE by the carrier in conjunction with the loop would create a stable interface to which competitive terminal equipment might be designed. This could occur where there is wide variability among loop characteristics, where the characteristics of each loop are unstable, or where facilities are changed frequently or are subject to extraordinary interference. In such cases, provision of NCTE by the carrier could promote competition among vendors of terminal equipment in that such equipment could be designed to interface with a standard interface specification, and the NCTE would provide the "customization" required to alter the loop characteristics to a form which would be compatible with that interface specification.[22] An additional function of such NCTE might

[21] If the source of trouble cannot be isolated and the difficulty proves on a premises visit to stem from a defective CSU or other unit of station equipment, a "maintenance of service" charge as specified in the tariffs would apply.

be to maintain unchanged an interface characteristic when loop facilities are modified to embrace a new technology (*e.g.*, to digital facilities when analog facilities were used previously, or to optical fiber or broadband facilities when analog voice-grade pairs were used previously). This use of NCTE might minimize dislocations to subscribers who already have purchased and deployed terminal equipment and who might otherwise be faced with the prospect of modification to, or obsolescence of, their equipment if they wish to maintain uninterrupted service.[23]

41. We emphasize that our identification of these possibilities should not be construed as endorsement of the potential arguments by carriers that, where such circumstances are present, they should have the right to supply NCTE in conjunction with loop facilities. We shall address any such circumstances on an *ad hoc* basis, and carriers will have the burden of persuading us that our general policy in favor of unregulated supply of NCTE should be altered in specific circumstances. The result of this proceeding is to reject the notion that NCTE be supplied exclusively by carriers on a regulated basis - we foresee no possibility under which this principle might be varied.

42. *LADC.* IDCMA argues that AT&T's rulemaking petition to accommodate LADC service under Part 68[24] similarly requires that we accommodate DDS under Part 68. The argument seems to be that since both services utilize metallic loops to provide digital services they must be teated identically. While LADC and DDS facilities utilize metallic loops and may carry digital data, they are designed as different service offerings under the tariffs on file with this Commission and may not be treated identically. In any case, in view of our decision herein to view CSUs as CPE, the matter is moot.

43. *Other proceedings.* In *Second Notice, supra*, at Appendix A, the Commission proposed a general definition for the demarcation point between customer premises equipment and wiring, and the

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[22] Of course, there is a correlative possibility that provisions of such NCTE by carriers in conjunction with loop facilities would have anti-competitive effects with respect to supply of the NCTE itself. We would consider this issue careully in response to any waiver request.

[23] One of the arguments made by the carriers in favor of supply of the CSU in conjunction with DDS is that it implements automatic remote testing. As discussed, we conclude that others' equipment similarly can be used to implement a remote testing function. As a practical matter, this approach raises no problem with respect to DDS service, or other digital services similar to it which are used by sophisticated users of relatively complex data processing equipment. By our decision herein, we do not necessarily foreclose the possibility of at some point authorizing the supply by carriers of limited function, NCTE-like equipment, perhaps combined with a protector block, which inexpensively implements a remote testing function in conjunction with broadly available services, *e.g.*, MTS. Upon an appropriate showing, we are prepared to address the possibility that remote testing (and no more) might be implemented as part of the loop offering.

[24] RM-3526. *See* NPRM-NOI, supra at 885–87.

telephone network. The effective redefinition of the demarcation point for DDS, *i.e.*, to include the CSU as customer-provided equipment and require measurement of performance standards at that point, would have no impact upon our proposed general definition.

IV. CONCLUSION

44. Having reviewed and considered the arguments offered by AT&T in opposition to IDCMA's rulemaking petition and the comments of IBM, CCIA, and those filing informal comments, we find no technical, legal or policy justification for restricting independent manufacturers from providing CSUs or digital NCTE to digital service subscribers. We fail to be convinced that AT&T has met its burden of showing that independent provision of CSUs or digital NCTE would be publicly detrimental. Our experience with competition in terminal equipment under the current Part 68 program leads us to believe that reliance on the marketplace to produce CSU-like devices that function compatibly with DDS, including remote maintenance operations,[25] is not publicly detrimental and will be privately beneficial. We find that there exist no reasons to further delay development of appropriate standards under Part 68 to permit registration and direct connection of terminal equipment to DDS (and other digital services, circuits and facilities utilizing digital NCTE or digital NCTE-like devices). Accordingly, we will offer for public comment IDCMA's technical proposals. *See* Appendix. We also ask that interested parties offer amendments to IDCMA's proposals to accommodate the higher speed digital service offerings, *e.g.*, DS-1, in the final rules.

45. In order to expedite the availability of alternatives to users and to implement our decision herein, we will require AT&T to file, within 30 days of publication of this notice in the Federal Register, appropriate tariff revisions to institute an interim plan. The tariff revisions should include an unbundling of all CSUs, CSU-like devices, and digital NCTE[26] so that any rates and charges associated with these devices, when provided by AT&T, are stated as separate rate elements. In addition, reasonable technical standards for direct interconnection of customer-provided CSUs, CSU-like devices and

[25] One alternative to requiring compatible loopback testing would be to require a switch or other loopback test mechanism on the network side of the demarcation point that could be activated independently of the operation of the customer-provided CSU. This would enable the telephone company to test its facilities up to the demarcation point. However, such an approach effectively would interpose a new network CSU-like device, unnecessarily duplicating the features more rationally required of the terminal CSU.

[26] As a practical matter, we anticipate that CSUs and digital NCTE will be incorporated as components in other digital equipment. When referring to CSUs or digital NCTE, we are referring to the CSU-like (or NCTE-like) component of such equipment.

digital NCTE to digital services and associated circuits and facilities[27] should be published in the tariffs or established by reference to specifications set forth in AT&T's PUB 41021, and other PUBs, supplemented as necessary. Such standards should include operational criteria for loop-back testing, and all necessary CSU, CSU-like, and digital NCTE technical specifications. We will require AT&T to submit these tariff revisions with a scheduled effective date of 30 days from their date of filing.

46. The use of a tariffed interim program is not without precedent. On March 17, 1983, the Commission allowed AT&T Tariff No. 270 (Transmittal No. 14186) to become effective. This tariff established a new service called High Capacity Circuits, which are dedicated private lines used for the transmission of digital signals at 1.544 Mbps, *i.e.*, DS-1. Initially, these circuits are to be provided via Terrestrial Digital Circuits (TDC), which are two-point, dedicated High Capacity Circuits used for simultaneous two-way transmission of serial, bipolar, return-to-zero isochronous digital signals at 1.544 Mbps, and are comprised entirely of terrestrial channels. In order to allow connections of customer-provided terminal equipment and systems to TDC, an interim program was established in Tariff No. 270. Under that program, which was also published in the Commission's Public Notices (No. 3260) on March 30, 1983, equipment and systems that were directly connected to a telephone company-provided 1.544 Mbps service, circuit or facility as of March 17, 1983, or meet the specifications of AT&T Technical Reference (PUB) 41451 and the report of the FCC/Industry Ad Hoc Task Group on Digital Interfaces,[28] may be included on the Commission's grandfather list of devices lawfully connectible to TDC. In the affidavit that must be filed with the Commission attesting to compliance with these specifications, a manufacturer must state that any equipment connected under the interim plan will be modified by the manufacturer (or his authorized agent) in response to revisions to Part 68 adopted in Docket No. CC 81-216 or RM-4087. Similarly, any

[27] Such tariff revisions should include provision for interconnection of NTCE with TDC (DS-1 rate signals) [*see*para. 46] and other digital services, circuits and facilities. Any future digital service, circuit or facility is equally subject to this requirement; where digital NCTE devices for such future service, circuit or facility requires special regulatory treatment, the waiver process discussed at para. 41, *supra*, remains available.

[28] In 1980, the Commission established an industry group to determine if revisions to Part 68 of the rules were necessary to allow connections of terminal equipment and systems to 1.544 Mbps digital channels. On December 1, 1981, the group reported that revisions were required and filed a report which identified those areas of Part 68 which should be revised. Subsequent to that report, AT&T filed a petition for rulemaking (RM-4087) requesting that Part 68 be amended to allow connections of digital terminal equipment to 1.544 Mbps digital channels. That petition is pending. Copies of PUB 41451 and the group report, as well as AT&T's proposals in RM-4087, are available through the Commission's copy contractor.

manufacturer that provides digital CSU/NCTE devices pursuant to the standards that will be specified by AT&T in its digital CSU/NCTE interim program must be prepared to modify those devices in response to the standards ultimately adopted in RM-4087.

47. The effect of our decision herein is to apply the provisions of Section 64.702 of the rules to CSUs and digital NCTE. By so doing, CSUs and digital NCTE may be offered only on an unregulated basis.[29] This means that CSUs and digital NCTE offered subsequent to the effective date of AT&T's interim equipment program (described at para. 45, *supra*) will be treated as CPE and fully subject to market competition.

48. *The IDCMA rule proposals, RM-3530.* IDCMA offers a set of technical proposals that it believes are necessary to establish standards for the registration and interconnection of CSU-like devices to DDS. These proposals appear essentially as offered by IDCMA in the Appendix hereto, modified in part to reflect the broader application discussed at paras. 26 and 44 herein. We will briefly describe each of the proposals.

49. Revisions to Section 68.2(a) are proposed to allow appropriate terminal equipment to connect to digital services, circuits and facilities. A new grandfathering provision is also offered that would permit equipment of a type lawfully connected to such services, circuits or facilities prior to notice in the Federal Register of adoption of final rules in this proceeding to be connected for up to six months thereafter and to remain connected without registration. In view of the current absence of non-telephone company-provided CSUs and digital NCTE, we also will utilize the interim program described in para. 45, *supra*, (interim program #2) to establish grandfathering eligibility. Further, in order to prevent possible harm to the network from devices that digitize analog signals, we will require CSUs and digital NCTE connected under interim program #2 to also comply with the requirements of the interim program of March 30, 1983 described in para. 46 (interim program #1). Thus, the requirement for modification of devices connected pursuant to interim program #1 to comply with any rules adopted in response to RM-4087 remains applicable to all registered and grandfathered CSUs and digital NCTE. *See* proposed Section 68.2(f) in the Appendix hereto.

50. IDCMA proposes to modify Section 68.100 to allow appropriate terminal equipment to be connected to the digital access lines used to provide DDS. Our proposed amendments to Section 68.2, which encompass all digital services, circuits and facilities, would seem to make this modification unnecessary. IDCMA also proposes revising Sections 68.200 and 68.206 to make those sections consistent with Section 68.218(a) and to make it clear that compliance with

[29] 84 FCC 2d 50, 61, n.10 (1980); 77 FCC 2d 384, 410–13 (1980).

certain inappropriate specifications not applicable to DDS is not required. Also, since ringer equivalence is a term that is not used in connection with regard to digital services, IDCMA proposes to amend the labeling requirement of Section 68.300. Finally, IDCMA offers revisions to Sections 68.308 and 68.310 to reflect the interference and longitudinal balance limitations necessary for DDS interconnection. We note that IDCMA's proposals do not reflect the high speed DDS offering, *i.e.*, 1.544 Mbps. In addition to offering comment on the rules in the Appendix, we ask interested parties to propose amended or additional rules necessary to implement registration and connection of CSUs and digital NCTE to DDS and other digital services, circuits and facilities.

51. *RM-4054.* AT&T proposes to add an alternative termination circuit to the current Part 68 loop and off-premises simulator circuits in order to permit a broader representation of actual network impedances during registration testing. AT&T suggests that hybrid balance circuitry tested in conjunction with this alternative test termination circuit will be reasonably assured of remaining within the bounds of the signal power limitations specified in Section 68.308 of the rules when connected to actual network loops. Comments were filed by GTE Service Corp. in support of AT&T's proposal. Interested parties are invited to comment on the proposed amendments to the definition of Loop Simulator Circuit and Off-Premises Line Simulator Circuit of Section 68.3, the proposed simulator circuit of Section 68.3(i), and the proposed note 3 to Figures 68.3(a) and (f). *See* Appendix.

52. *Part 68 or tariff procedures.* Upon receipt of comments on these proposed rule changes, and upon evaluation of the tariff filings implementing an interim program, we will be in a position to evaluate whether, and to what extent, rule changes are necessary. Registration has proven efficacious over the last eight years as a means of protecting the nationwide network from technical harm caused by the interconnection of customer-provided terminal equipment, but it has not been the exclusive procedure utilized. *See, e.g., Offer of Facilities to Other Common Carriers (Group/Supergroup)* in Docket No. 21499, FCC 83–39, (released February 15, 1983), and *Memorandum Opinion and Order (Plugs and Jacks)* in Docket Nos. 19528, 20774 and 21182, 70 FCC 2d 1800 (1979), for discussion of the use of the tariff mechanism in cases of relatively nonubiquitous, specialized interconnection offerings. With regard to our rulemaking proposals herein, we request comment on whether a tariff alternative should be employed here, rather than rules, and upon criteria which might be established to determine whether and under what conditions we should use rule or tariff procedures in future interconnection programs.

53. *Regulatory Flexibility Act Initial Analysis*

I. *Reason for Action.* The Commission is responding to a petition for rulemaking filed by IDCMA that seeks to expand the range of services currently encompassed under Part 68 of the Commission's rules. IDCMA proposes standards that would permit the direct connection of certain terminal devices to AT&T's DDS lines.

II. *The objective.* The Commission proposes to amend the scope of Part 68 of its rules to permit non-telephone company-provided CSU-like devices to be directly connected to DDS loops. The Commission also proposes to establish standards under Part 68 by which such devices may be registered.

III. *Legal basis.* Legal action as proposed is in furtherance of Sections 201–205 of the Communications Act of 1934, as amended, which require the provision of communications service offerings on a reasonable and not unreasonably discriminatory basis. *See* para. 55, *infra.*

IV. *Description, potential impact and number of small entities affected.* Development of rules to permit the registration and direct connection of CSU-like devices to DDS will follow the Commission's policy over the last seven years to open the provision of telephone network terminal equipment to competition. Such devices will be manufactured by an unspecified number of manufacturers who will benefit from the creation of a new market. No longer will Western Electric constitute the sole source of supply for the CSU. Price and feature innovation that has characterized the competitive marketplace for telephones, PBXs, and the like, will extend as well to CSUs. We see positive impact on small entities by our proposal to modify Part 68 of the rules.

V. *Recording, record keeping and other compliance requirements.* No significant additional paperwork will be required by the proposals set forth in this proceeding. New devices submitted for registration will constitute a negligible increase in the total number of devices currently being processed by the Commission.

VI. *Federal rules which overlap, duplicate or conflict with this rule.* None.

VII. *Any significant alternatives minimizing impact on small entities and consistent with stated objective.* The Commission's alternative is to restrict the competition in provision of CSU-like devices. For the reasons discussed herein, we believe such an alternative is inconsistent with the public interest and would unnecessarily restrict the development of healthy competition in the CSU marketplace.

V. EX PARTE PRESENTATIONS

54. For purposes of this non-restricted informal rulemaking proceeding, members of the public are advised that *ex parte* contacts are permitted from the time of issuance of a notice of proposed rulemaking until the time a draft order proposing a substantive disposition of such proceeding is placed on the Commission's Sunshine Agenda. In general, an *ex parte* presentation is any written or oral communication (other than formal written comments/pleadings and oral arugments) between a person outside the Commission and a Commissioner or a decision-making member of the Commission's staff which addresses the merits of the proceeding. Any person who submits a written *ex parte* presentation must serve a copy of that presentation on the Commission's Secretary for inclusion in the public file. Any person who makes an oral *ex parte* presentation addressing matters not fully covered in any written comments previously filed in the proceeding must prepare a written summary of that presentation which must be served on the Commission's Secretary for inclusion in the public file, with a copy to the Commission official(s) receiving the oral presentation. Each *ex parte* presentation discussed above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. *See generally* Section 1.1231 of the Commission's rules, 47 C.F.R. § 1.1231. In reaching its decision, the Commission may take into consideration information and ideas not contained in the comments, provided that such information or a writing indicating the nature and source of such information is placed in the public file, and provided that the fact of the Commission's reliance on such information is noted in the Report and Order.

VI. ORDERING CLAUSES

55. Accordingly, and in view of the foregoing, IT IS HEREBY ORDERED, pursuant to Sections 1, 4, 201–05 and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154, 201–05 and 403, and 5 U.S.C. § 553, that this docketed rulemaking proceeding IS HEREBY EXPANDED to consider further amendments to Part 68 of the Commission's Rules and Regulations, 47 C.F.R. Part 68.

56. IT IS FURTHER ORDERED, pursuant to Sections 1, 4, 201–05, 215, 218, 220, 313, 309(e)-(h) and 412 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154, 201–05, 215, 218, 220, 313, 309(e)-(h) and 412, and 5 U.S.C. § 553, that NOTICE IS HEREBY GIVEN of proposed rule changes in Part 68 of the Commission's Rules and Regulations, 47 C.F.R. Part 68, in accordance with the discussion and delineation of issues herein.

57. IT IS FURTHER ORDERED that, pursuant to Sections 1, 4,

201–05 and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154, 201–05 and 403, AT&T SHALL REVISE ITS INTERSTATE TARIFFS to provide an interim interconnection program for CSUs and digital NCTE devices, as described at paragraphs 45 and 46 herein.

58. IT IS FURTHER ORDERED that on the effective date of AT&T'S interim program for the interconnection of CSUs, CSU-like devices, and NCTE to its digital services, circuits and facilities, such devices shall be considered CPE for purposes of Section 64.702 of the Commission's rules, 47 C.F.R. § 64.702.

59. IT IS FURTHER ORDERED that the Secretary shall cause a copy of this order to be published in the Federal Register.

60. Interested parties may file comments to the matters contained in the Appendix hereto on or before July 29, 1983, and reply comments on or before August 17, 1983. In accordance with the provisions of Section 1.419 of the Commission's Rules and Regulations, 47 C.F.R. § 1.419, an original and five (5) copies of all comments shall be furnished to the Commission. All submissions filed in this proceeding will be available for public inspection during regular business hours in the Commission's Docket Reference Room.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

APPENDIX

It is proposed that Part 68 of the Commission's Rules and Regulations (Chapter 1 of Title 47 of the Code of Federal Regulations, Part 68) be amended as follows:

1. It is proposed to revise Sections 68.2(a) and (f) to read as follows:

§ 68.2 Scope.

* * * * *

(a) General. Except as provided for in paragraphs (b), (c), (d), (e), and (f), the rules and regulations in this part apply to the direct connection:

(1) Of all terminal equipment to the public switched telephone network, for use in conjunction with all services other than party line service and coin service;

(2) Of all terminal equipment to channels furnished in connection with foreign exchange lines (customer-premises end), the station end of off-premises stations associated with PBX and Centrex services, trunk-to-station tie lines (trunk end only), switched service network lines (CCSA and EPSCS), and digital services, circuits or facilities; and

(3) Of all PBX (or similar) systems to private line services for tie trunk type interfaces, off-premises station lines, automatic identified outward dialing, message registration, and digital services, circuits or facilities. Additional types of services may be added to this section only through rulemaking proceedings, and equipment connected to such added services will be afforded a reasonable transition period.

* * * * *

(f) Channel service units (and other network channel termination equipment)

directly connected to digital services, circuits or facilities on [date of appearance of final rules in this proceeding in the Federal Register] will be grandfathered, and new equipment which is of the same type as grandfathered equipment may be directly connected to such digital services, circuits or facilities without registration for six months thereafter. Other such equipment must be registered prior to connection. All grandfathered and registered equipment so connected remains subject to modification by the manufacturer or an authorized agent thereof as necessary to comply with any analog conversion limitations specified in FCC tariffs or this Part.

* * * * *

2. It is proposed that in Section 68.3 a note (3) be added to Figures 68.3(a) and 68.3(f); a new drawing entitled "Alternative Termination" (Figure 68.3(i)) be added; and Sections 68.3(j) and 68.3(q) be revised as follows:

§ 68.3 Definitions.

* * * * *

(3) Tests for compliance may be made with either R1 = 600 Ohms or R1 replaced by the alternative termination shown in Figure 68.3(i).

* * * * *

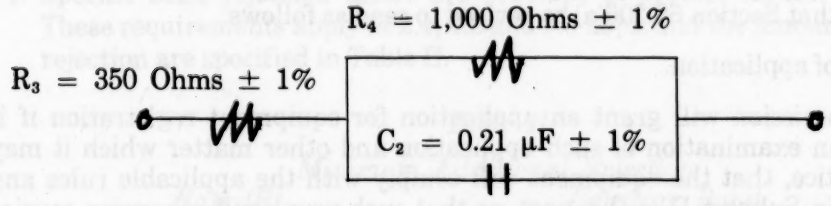

Figure 68.3(i)

Note: When this alternative termination is used during signal power compliance testing, it replaces R1 (600 Ohms) in the loop simulator circuit.

* * * * *

(j) *Loop Simulator Circuit*: A circuit that simulates the network side of a 2-wire or 4-wire telephone connection during testing. A schematic of the type of circuit that will be required is shown in Figure 68.3(a) for 2-wire loop or ground start circuits, Figure 68.3(b) for 2-wire reverse battery circuits, Figure 68.3(c) for 4-wire loop or ground start circuits, and 68.3(d) for 4-wire reverse battery circuits. Figure 68.3(i) is an alternative termination for use in the 2-wire loop simulator circuits. Alternative implementations may be used provided that the same dc voltage and current characteristics and ac impedance characteristics will be presented to the equipment under test as are presented in the illustrative schematic diagrams. When used, the simulator circuit shall be operated over the entire range of loop resistance as specified in the Figures, and with the indicated polarities and voltage limits. Whenever loop current is changed, sufficient time shall be allocated for the current to reach a steady-state condition before continuing testing.

* * * * *

(q) *Off-Premises Line Simulator Circuit*: A load impedance for connection, in lieu of an off-premises station line, to PBX (or similar) telephone system loop start circuits (Figure 68.3(f)) during testing. The schematic diagram of Figure 68.3(f) is illustrative of the type of circuit which will be required. Figure 68.3(i) is an alternative termination for use in the 2-wire loop simulator circuits. Other implementations may be used provided that the same dc voltage and current characteristics and ac impedance characteristics will be presented to the equipment under test as are presented in the illustrative schematic diagrams. When used, the simulator shall be operated over the entire range of loop resistances as indicated in Figure 68.3(f), and

with the indicated polarities. Whenever loop current is changed, sufficient time shall be allocated for the current to reach a steady-state condition before continuing testing.

* * * * *

3. It is proposed to revise Section 68.200(d) to read as follows:

§ 68.200 Application for equipment registration.

* * * * *

(d) A statement that the terminal equipment or protective circuitry complies with and will continue to comply with the appropriate rules and regulations in Subpart D of this part accompanied by such test results, description of test procedures, analyses, evaluations, quality control standards and quality assurance standards as are necessary to demonstrate that such terminal equipment or protective circuitry complies with all the applicable rules and regulations in Subpart D of this part. The Office of Science and Technology may issue an OST Bulletin describing acceptable test methods; other test methods may be employed provided they are fully described in the application and are found acceptable by the Commission.

* * * * *

4. It is proposed that Section 68.206(a) be revised to read as follows:

§ 68.206 Grant of application.

(a) The Commission will grant an application for equipment registration if it finds from an examination of such application and other matter which it may officially notice, that the equipment will comply with the applicable rules and regulations in Subpart D of this part, or that such grant will otherwise service the public interest.

* * * * *

5. It is proposed that a new subsection (c) be added to existing Section 68.300 as follows:

§ 68.300 Labelling requirements.

* * * * *

(c) Registered terminal equipment for connection to the digital services, circuits or facilities will not include a ringer equivalence number on the label. Instead, such equipment must state: "For use solely on digital interfaces."

6. It is proposed that a new subsection (g) be added to Section 68.308 as follows:

§ 68.308 Signal power limitations.

* * * * *

(g) *Interference Limitations for transmission of bipolar (non-return to 0) signals over digital services, circuits and facilities*

Prior to any frequency shaping filters, the system excitation is defined by an ideal 50 percent duty-cycle rectangular pulse. The relation of bit rate, R, in kbps and pulse amplitude, A, in Volts, is given in Table I.

The power shall not exceed 0 dBm for 9.6 kbps or +6 dBm for 2.4 kbps, 4.87 kbps and 56.0 kbps. These are average power transfers with matched 135 Ohm driving and terminating resistances.

Table I

Driving Pulse Amplitude

Pulse Rate (R) *kbps*	*Amplitude (A)* *Volts*
2.4	3.32
4.8	3.32
9.6	1.66
56.0	3.32

1. The average power transfer is measured across a 135 Ohm terminating resistance with a matched 135 Ohm driving resistance.

2. The average power transfer will be measured using a random signal sequence (O or +1 equiprobable in each pulse interval).

3. For all rates the driving pulse will be shaped by a single real pole low pass filter having a cutoff frequency in Hertz equal to 1.3 × bit rate.

4. Specific band rejection filters are provided to protect certain other services. These requirements apply at 2.4, 4.8 and 9.6 kbps, and the amounts of additional rejection are specified in Table II.

Table II

Minimum Additional Rejection

Rate (R) *kbps*	*Rejection Band* *24-32 kHz*	*72-80 kHz*
2.4	5 dB	1 dB
4.8	13 dB	9 dB
9.6	17 dB	8 dB

7. It is proposed that a new subsection (1) be added to Section 68.310 as follows:

§ 68.310 Longitudinal balance limitations.

* * * * *

(1) *Terminal equipment connected to digital services, circuits or facilities*

The metallic termination used for the performance of the test shall be 135 Ohms, the longitudinal termination may be kept at 500 Ohms, and all tests shall be made with the device in an active mode. For equipment operating in the frequency range of 200–1000 Hertz, the minimum balance requirement shall be 60 dB. For equipment operating in the frequency range of 1–15 kHz, the miminum balance requirement shall be 40 dB.

Microwave, Dom. Public Point-to-Point, Technical Requirements Proceeding Termination of

Report and Order adopted terminating proceeding. Commission concluded that technical standards, licensing, and frequency coordination requirements applied to this service will remain unchanged. Low power point-to-point microwave service will not be extended to 24 GHz band.
–Amendment of Part 94 & 15
Gen. Docket No. 79–337

FCC 83–166

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Amendment of Part 94 of the Commission's Rules and Regulations to facilitate operation of low power, limited coverage systems in the 22.0–23.6 GHz band,	Gen Docket No. 79–337 RM-3241
and	
Amendment of Part 15 of the Commission's Rules to create a new class of low power unlicensed microwave device in the 24 GHz band.	RM-3678

SECOND REPORT AND ORDER
(PROCEEDING TERMINATED)

(Adopted: April 27, 1983 Released: May 5, 1983)

BY THE COMMISSION: COMMISSIONER JONES ABSENT.

Summary of Action

1. In the *First Report and Order* in this docket,[1] the Commission created a low power microwave communications service in the 23 GHz band. Here we have concluded that the technical standards, licensing and frequency coordination requirements applied to this new service should be retained. In addition, we conclude that low power point-to-point microwave service should not be extended to the 24 GHz band.

[1] *First Report and Order*, FCC 80–485, released August 19, 1980, 47FR55731 August 21, 1980, 81 FCC 2nd 140 (1980).

Background

2. The *First Report and Order* amended Part 94 of the Commission's Rules to provide for the operation of short haul, low cost, low power microwave communications systems in four channel pairs within the band segments 21.8–22.0 GHz and 23.0–23.2 GHz with somewhat relaxed technical standards.[23] During the course of the proceeding, two commenters, General Electric Company (GE) and M/A-COM, Incorporated (M/A-COM), questioned the necessity for frequency coordination for these low power devices. M/A-COM stated that the cost of frequency coordination might be greater than any savings realized in relaxing the technical standards and GE agreed that uncoordinated operations would meet the needs of some users. Further, both GE and M/A-COM suggested that Part 15 of the Rules could be amended to allow operation of these devices without a license. GE also suggested that the Commission adopt a temporary licensing program for these systems. Additionally, on 15 May 1980, M/A-COM petitioned the Commission (RM-3678) to amend Rule Part 15 to accommodate the operation of low power fixed service microwave radio systems in the 24.05–24.25 GHz band. The issues raised by GE and M/A-COM were not resolved in the *First Report and Order*. Instead, the Commission issued a *Further Notice of Proposed Rule Making* (*FNPRM*) to seek comment on these matters.[4]

Further Notice of Proposed Rule Making

3. The applications for the low power systems foreseen by GE and M/A-COM, and the issues raised by the companies, were sufficiently similar to warrant consolidation of the M/A-COM petition into this proceeding. The Commission did not want to delay introduction of the low power devices while the issues of frequency coordination and unlicensed operations were being solved. In the *FNPRM*, the Commission asked for public comment on questions concerning the need for frequency coordination and licensing of the low service and on the appropriate technical standards. We stated that we saw merit in providing spectrum for non-frequency coordinated operations in the 22 to 24 GHz band because these low power devices were envisioned to be highly directional and to have limited (short range) interference potential. Thus, we proposed to eliminate

[3] The term 'low power' is derived from the fact that operations in the 23 GHz band pursuant to § 94.73 are limited to transmitter output power of 10.0 watts or less, whereas operations on the four subject channel pairs using reduced technical standards pursuant to § 94.91 are limited to transmitter output power of 0.1 watts or less.

[4] *FNPRM*, FCC 80–486, released August 19, 1980, 45FR55775, August 21, 1980.

the coordination requirement for the channel pair 21.825/23.025 GHz,[5] except within 25 kilometers of the Canadian and Mexican borders. We also proposed to apply the same technical standards set forth for the other low power devices to this channel pair. Furthermore, we stated that some form of licensing seems appropriate because these low power microwave operations do not fall within Part 15 of the Rules. However, we posed questions on these points. We specifically asked commenters to address the following questions:

(a) Is one 50 MHz channel pair sufficient for non-frequency coordinated operations?

(b) Should unlicensed operations of these devices be permitted? If so, under what conditions?

(c) Is there a need for temporary or point of sales licensing?

(d) Should these devices be subject to different technical standards than proposed?

(e) Is there a need to permit mobile operation and if so, what would be the implication for fixed operations?

Discussion

4. Comments were filed by M/A-COM, GE, Datapoint Corporation (Datapoint) and the Central Committee on Telecommunications of the American Petroleum Institute (API). Reply comments were filed by M/A-COM, GE and API.

5. All agreed that there is merit in providing spectrum for non-frequency coordinated operations for those users who are willing to forego guarantees of protection from interference in order to implement operations more quickly. There was disagreement, however, over how many channels should be designated for non-frequency coordination and whether they should be taken from the four channel pairs or from other spectrum. API felt that spectrum for non-frequency coordinated operations should be limited to one channel pair, while M/A-COM and Datapoint felt that several, or all, of the channels in these band segments should be so designated. GE felt that several pairs should be allocated for non-frequency coordinated operations but that they should be taken from other band segments in this region of spectrum.

6. Since the time of the *Report and Order* and *FNPRM*, these low power channels have experienced significant development and several manufacturers now provide equipment for voice, data and video transmissions. There are now a substantial number of licensees and applicants, which could be affected by non-frequency coordinated operations. At present, usage of the low power channels is evenly distributed over the four channel pairs available at 21.8–22.0 GHz and 23.0–23.2 GHz. Additionally, the receivers currently

[5] The four available channels are: 21.825/23.025, 21.875/23.075, 21.925/23.125 and 21.975/23.175 GHz.

available are highly susceptible to interference from adjacent channel signals.[6] Thus, the introduction of uncoordinated operations on the 21.825/23.025 GHz channel pair would also have an adverse impact on adjacent channel operations which would remain subject to prior frequency coordination. In the absence of prior frequency coordination, the Commission and its licensees would have to rely on after-the-fact investigation to detect and eliminate adjacent channel interference. Such investigations could be more expensive and time consuming than prior frequency coordination. While it might be possible to require frequency coordination for adjacent channel operations without requiring coordination for co-channel operations, we doubt that this approach would speed up the licensing process.

7. As M/A-COM noted in its comments, it is difficult to allow uncoordinated operations if there are already users who have done frequency coordination and expect to operate with guaranteed freedom from interference. For this reason we are not changing the rules of Part 94 to provide for uncoordinated operations in the band segments 21.8–22.0 GHz and 23.0–23.2 GHz.

8. We do not find that it is appropriate to introduce a non-frequency coordinated, unlicensed communications service into the 24 GHz band. The band is allocated on a primary basis for Federal Government radiolocation use and on a secondary basis for non-Government radiolocation and amateur use, as well as for Industrial, Scientific and Medical Service (ISM) equipment. The frequencies are already being used by radar devices, and NTIA has recommended that the operations proposed by M/A-COM not be permitted in the 24 GHz band because they would be inconsistent with the current allocated use of the band.[7] We are, therefore, not adopting rules authorizing low power microwave operations in the 24 GHz band.

9. The possibilities for providing spectrum for non-frequency coordinated operations in other band segments are being considered in Docket 82–334, which is dealing with the development of utilization policy for fixed and mobile services' use of certain bands between 947 MHz and 40 GHz. The *Notice of Inquiry* [8] in that Docket solicited comments on the need for coordination in bands between 17.7 and 40.0 GHz, and the *Notice of Proposed Rule Making* [9] in that

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[6] Most receivers at 23 GHz employ simple Schottky diode detectors which have front-end responses of nearly 200 MHz. Even superheterodyne receivers have IF's of a full 50 MHz and a frequency stability of ±11.5 MHz.

[7] Letter dated February 1981 from Mr. Leo A. Buss, Director, Spectrum Plans & Policies, NTIA to Mr. Robert L. Cutts, Chief, International and Operations Division, FCC. A copy of this letter has been placed in the docket file of this proceeding.

[8] Paragraphs 52 and 53 of the *NOI*, (FCC 82–286, released July 9, 1982, 47FR31959, July 23, 1982).

[9] Paragraphs 29–30 of the *NPRM*, (FCC 83–2, released January 13, 1983, 48FR6730, February 25, 1983).

Docket proposed to allocate all of the spectrum at 31.0–31.2 GHz for low power, non-frequency coordinated operations. That band is already allocated to the fixed and mobile services.

10. The commenters agreed that some form of licensing is necessary to provide records to locate sources of interference in bands where protection is afforded. M/A-COM noted that temporary licensing is not compatible with frequency coordination since the value of temporary licensing is to provide more immediate access to the spectrum while the purpose of frequency coordination is to make the review necessary to insure that operations will be interference free. GE, on the other hand, suggested a temporary licensing approach wherein applicants who had completed frequency coordination could immediately implement their systems, subject to final review by the Commission.

11. The issue of applying temporary licensing procedures to channels where frequency coordination is required has been treated in the *First Report and Order* in this proceeding and in a *Memorandum Opinion and Order* responding to a Petition for Limited Reconsideration filed by GE. We found that to preserve an interference protected environment, we should continue the review of all applications prior to grant of license. The need to provide operational safeguards against the possibility of temporarily licensed users causing interference to other licensees is now even more important given the growth and use discussed above. Therefore, we will continue the existing licensing procedure for these channels.

12. The commenters generally agreed with the technical standards in § 94.91 and felt that there should not be different standards for non-coordinated equipments if channels were set aside for these operations. M/A-COM, however, said that the beamwidth standard should be relaxed to permit 6° beamwidth antennas; this would allow 8 inch rather than 12 inch antennas. On the other hand, GE argued that narrow beams resulting from the 4° beamwidth antenna standard provide more efficient spectrum utilization and lessen chances for interference. The commenters also agreed that certain operating standards, specifically those dealing with user transmitter measurements (§ 94.85), notification to the local Engineer-In-Charge (§ 94.55) and maintenance of station records (§ 94.113) are excessive regulation and unneeded for the low power operations. The suggestion to delete these regulations is beyond the scope of this proceeding and are more appropriately addressed in the context of Docket 82-334 where more general regulatory issues are being considered, and they will be taken into account in that proceeding.

13. With regard to mobile operations, commenters indicated that the need for mobile operations at this frequency range is unknown but likely to be small. Further, the possibilities of interference arising from mobile operations are likely to be small at this frequency range and short-lived due to movement of the mobiles.

Until further experience is gained, we will not make particular provisions for mobile operations. We will handle applications on a case-by-case basis.

Other Matters

14. The Commission still has before it for consideration the matters raised in GE's Petition for Limited Further Reconsideration of the *First Report and Order*, filed October 29, 1981, in this docket. GE objected to the channel assignment policy set out in the *First Report and Order* and the *Memorandum Opinion and Order* adopted on September 22, 1981 and released on September 29, 1981. GE contended that the Commission's Rules, by mandating the use of designated channel pairs in the 21.8–22.0 GHz and 23.0–23.2 GHz band segments, would result in highly inefficient spectrum utilization. GE was concerned that the technical limitations of state-of-the-art receiver design would preclude users from establishing parallel 23 GHz systems on adjacent channels. Thus, GE sought a channel assignment scheme which would provide licensees with the flexibility to establish 50 MHz guardbands between the transmit frequencies used by parallel systems. GE argued, therefore, that the Commission should not designate any particular channels for use in simplex or duplex systems.

15. GE stated, further, that if the Commission felt it necessary to maintain a formal channel assignment plan, it would be necessary to rearrange the channelization plan set forth in the *First Report and Order*. To provide for a 50 MHz guardband between parallel systems, GE urged the Commission to designate the 21.825/23.025 GHz channel pair, which was allocated in the *First Report and Order* for simplex operations, for duplex operations. Similarly, GE urged that the 21.975/23.175 GHz pair, previously designated for duplex operation, be made available for simplex systems.

16. Racon, Inc. (Racon) and M/A-COM filed comments in response to GE's Petition for Limited Further Reconsideration and, in turn, GE submitted a Reply and Request for Expedited Action. Racon pointed out that its products utilized receiver technology similar to that employed by GE. Racon therefore supported GE's arguments in favor of a more flexible channel assignment scheme. M/A-COM expressed the belief that it would be unwise for the Commission to adopt any policies "intended to protect nonselective receivers from interference." M/A-COM noted that the guardbands needed to protect GE's receivers from adjacent channel interference were spectrally inefficient and would be contrary to the public interest. M/A-COM concluded that the Commission should not adopt a channelization plan merely for the purpose of protecting adjacent channel receivers from interference when the same purpose could be accomplished with higher-stability oscillators and more selective receivers.

17. On October 15, 1982, the Commission issued a *Public Notice* which summarized and further clarified the licensing policies adopted for low power microwave systems in the 23 GHz band. The *Public Notice* reaffirmed that, in accordance with existing Commission rules, the channels designated for single or adjacent channel operations could be assigned for duplex operations and vice versa in certain situations when necessary to avoid intra-system or inter-system interference. The *Public Notice* also made it clear that adjacent channel operations could be authorized on frequencies other than those so designated upon a technical showing justifying the need for a exception to the established channel assignment plan. In response to the *Public Notice*, GE, on November 12, 1982, filed a Motion to Dismiss its Petition for Limited Further Reconsideration. In view of the fact that the matters raised in GE's Petition and in the corresponding comments filed by Racon and M/A-COM now appear to be moot, we think it appropriate to dismiss GE's Petition for Limited Further Reconsideration.

Conclusion

18. Accordingly, IT IS ORDERED, that pursuant to Section 4(i) and 303(r) of the Communications Act of 1934, as amended, the General Electric Company's Petition for Limited Further Reconsideration, filed October 29, 1981, is DISMISSED as moot.

19. IT IS FURTHER ORDERED that this proceeding is TERMINATED.

20. For futher information contact Donald Draper Campbell, Spectrum Management Division, 202-653-8177.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Satellite Domestic Communications
Satellite Launch Authority
Satellite Orbit

Applications to construct and launch space stations in Domestic Fixed Satellite Service granted to satellite private line carrier. Proposal is consistent with Commission's policies and serves the public interest, convenience and necessity.
–*American Satellite Company*

FCC 83–189

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of the Applications of AMERICAN SATELLITE COMPANY For Authority to Construct, Launch and Operate Space Stations in the Domestic Fixed-Satellite Service	File Nos. 521-DSS-P/LA-82 522-DSS-P/LA-82 523-DSS-P-82

ORDER AND AUTHORIZATION

(Adopted: April 27, 1983 Released: August 4, 1983)

BY THE COMMISSION: COMMISSIONER JONES ABSENT; COMMISSIONER RIVERA DISSENTING AND ISSUING A STATEMENT

1. The Commission is considering the above-captioned applications filed by American Satellite Company (ASC) to construct and operate a new domestic satellite system. ASC proposes to construct three satellites, of which two are to be launched and operated in orbit and the third retained as an on-ground spare. Public notice of the applications was given on December 23, 1981. A petition to deny was filed by United States Satellite Systems, Inc. (USSSI). Additionally, comments were filed by COMSAT General Corporation, RCA American Communications, Southern Pacific Communications Company, and Western Union Telegraph Company. For the reasons discussed below, we deny the petition and grant ASC's applications.

2. ASC is owned on an equal basis by wholly owned subsidiaries of Fairchild Industries and Continental Telephone Corporation.[1] ASC is currently providing domestic satellite services on a common carrier basis using an undivided 20% ownership interest in the Westar domestic satellite system.[2]

3. Each of the new ASC satellites will be "hybrids," carrying 12 narrowband (36 MHz) 4;6 GHz transponders, six wideband (72 MHz) 4;6 GHz transponders and six wideband (72 MHz) 12;14 GHz transponders. The satellite mission lifetime in orbit is estimated at 8.5 years. Coverage of all 50 states can be provided at 4;6 GHz, but only the 48 contiguous states are covered at 12;14 GHz. Launches are scheduled in September 1985 and March 1986. ASC anticipates that its satellite system will provide voice, data and video transmissions on a common carrier basis. It estimates the cost of a two in-orbit and one on-ground spare system to be $227 million, with first year operating costs of $1.7 million for the space segment. The company has obtained a $350 million line of credit to finance the satellite system.[3] ASC requests one orbital position capable of providing 50 state coverage so that it may continue to serve its Puerto Rican and Hawaiian customers, as well as Alaska, at 4;6 GHz. In order to maintain service quality to population centers on the East Coast at 12;14 GHz, it requests that its second satellite be provided with an orbital location in the eastern portion of the arc. Specifically, ASC requests to be assigned the locations of 122° and 88° West Longitude.

4. USSSI's principal objection to the ASC satellites is that they are inefficient because of their failure to make full frequency re-use of the 12;14 GHz transponders. USSSI contends that ASC does not reveal any detail as to use or operations of the 12;14 GHz transponders. ASC responds that weight limitations make it impossible to utilize frequency reuse techniques for the 12;14 GHz capacity on its satellites. Moreover, it argues that any inefficiencies that may exist are negated by the cost savings inherent in the building, launching and operating of one satellite which includes both 4;6 GHz and 12;14 GHz as opposed to separate satellites for each frequency band. Other issues raised with respect to this proposal and the processing of these applications are fully resolved in the *Report and Order* in CC Docket No. 81–704, FCC 83–184, and *1983 Orbit*

[1] *See* American Satellite Corporation, 80 FCC 2d 254 (1980).

[2] *See* Western Union Telegraph Company, 86 FCC 2d 196 (1981). Fairchild and Continental were each authorized to acquire 25% interests in the TDRSS/Advanced Westar system, and ASC had been authorized to use 50% of the commercial capacity of the Advanced Westar satellites. Subsequently, Western Union relinquished its interest in the TDRSS/Advanced Westar system and Advanced Westar is no longer authorized for domestic satellite operations. *See* Western Union Telegraph Company, FCC 83–196, adopted today.

[3] *See* letter from ASC to the Commission dated October 19, 1982. Moreover, the financial qualifications of the parents of ASC are a matter of record before the Commission, and ASC's qualifications are not at issue in this proceeding.

Assignment Order, FCC 83–186, both adopted today, and we will not repeat that discussion here.[4]

5. In related actions taken today, we have reduced orbital spacings between domestic satellites in the 4;6 GHz and 12;14 GHz bands so that additional satellites might be accommodated in orbit to satisfy growing demands for domestic satellite services. *See Report and Order, supra*. We are taking these actions to continue the opportunities for initial entry by new companies into the domestic satellite market, as well as to provide for the expansion of existing systems already in place. Under these new criteria, we are able to grant all of the applications in the current processing group under our open entry domestic satellite licensing policies. Thus, we are able to grant them without the need to resort to a comparative hearing. Moreover, ASC's entry as a new space segment operator will further our goal of maximizing competitive supply of satellite services.

6. We recognize that hybrid satellites of the design proposed by ASC require various tradeoffs between orbit use efficiency and the cost of satellite construction. While the ASC satellite design does not achieve full spectrum re-use, we believe that ASC has made a sufficient showing for us to find that their applications will serve the public interest under current circumstances. We will therefore assign two hybrid locations to ASC. However, as discussed in the *Report and Order, supra*, we can not conclude that grant of authority for additional satellites of the same design will be similarly received in the future.

7. Accordingly, IT IS ORDERED that Application File Nos. 521-DSS-P/LA-82, 522-DSS-P/LA-82 and 523-DSS-P-82 ARE GRANTED and American Satellite Company IS AUTHORIZED to construct three domestic communications satellites in accordance with the terms, conditions and technical specifications set forth in its applications and the formal instruments of authorization to be issued at a later date.

8. IT IS FURTHER ORDERED that American Satellite Company IS AUTHORIZED to launch and operate two space stations in the domestic Fixed-Satellite Service in accordance with the *1983 Orbit Assignment Order*, FCC 83–186, adopted today.

9. IT IS FURTHER ORDERED that American Satellite Company shall comply with all the requirements of the *Report and Order*,

[4] We believe that this decision, along with our decision in Domestic Fixed Satellite Services, 90 FCC 2d 1 (1982), *recon. denied*, and the Memorandum Opinion and Order, FCC 83–183, adopted today, are fully dispositive of any arguments raised with respect to the processing of these applications. This also includes issues raised concerning the application of our *1980 Processing Order*, 77 FCC 2d 856 (1980), and any potential hearing rights that might be granted under the *Ashbacker Doctrine*. *See* Ashbacker Radio Corporation v. FCC, 326 FCC 2d 327 (1945). Moreover, our *1983 Orbit Assignment Order*, FCC 83–196, resolves all issues raised by the parties relating to particular orbit assignments.

FCC 83–184 in CC Docket No. 81–704, and *1983 Orbit Assignment Order*, FCC 83–186, both adopted today, as well as the terms and conditions of all other previous orders and authorizations.

10. IT IS FURTHER ORDERED that, unless extended by the Commission for good cause shown, each of these authorizations shall become null and void in the event the space station is not constructed, launched and successfully placed into operation in accordance with the technical parameters and terms and conditions of this authorization, and no later than the following dates specified in the applications for these facilities:

	Construction Commenced	*Construction Completed*	*Launch (No later than)*
ASC I	* * *	May 31, 1985	September 30, 1985
ASC II	May 31, 1983	September 30, 1985	March 31, 1986
ASC III	December 31, 1983	April 30, 1986	(ground spare)

11. IT IS FURTHER ORDERED that the temporary assignment of any orbital location to American Satellite Company is subject to change by summary order of the Commission on 30 days notice and does not confer any permanent right to the use of the orbitor spectrum. Such a change may be ordered *inter alia* to implement uniform 2° separations, to require colocation of in-orbit satellites in the event of excess spare capacity, or to implement any of the objectives or policies set forth in today's *Report and Order*, FCC 83–184, in CC Docket No. 81–704, or *1983 Orbit Assignment Order*, FCC 83–186. Neither this authorization nor any right granted by this authorization, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, or by transfer of control of any corporation holding this authorization, to any person except upon application to the Commission and upon a finding by the Commission that the public interest, convenience, and necessity will be served thereby.

12. IT IS FURTHER ORDERED that the Petition to Deny filed by United States Satellite Systems, Inc. IS DENIED.

13. American Satellite Company is afforded thirty days from the date of release of our *Report and Order*, *supra*, to decline these authorizations as conditioned. Failure to respond within that period will constitute formal acceptance of the authorizations as conditioned.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

DISSENTING STATEMENT OF COMMISSIONER HENRY M. RIVERA

RE: Applications of American Satellite Co. for Authority to Construct and Launch Space Stations in the Domestic Fixed Satellite Service.

The majority's decision to authorize construction of these hybrid satellites, which are incapable of full frequency re-use, perpetuates an undesirable spectrum management policy[1] without a significant countervailing justification. Hybrid satellites are economically attractive as a generic proposition, but we can no longer afford to authorize their construction unless they incorporate state-of-the-art technology comparable to that possible for single band satellites.

The majority's approval of Amsat's construction permit applications is apparently premised on the equitable consideration that if Amsat is held to the newly adopted policy on hybrids, it will lose some of the money spent developing its construction plan. Although this would be unfortunate, an applicant obviously has no legal right to have its proposals judged against discredited standards and policies. Furthermore, the majority's calculus assigns no weight to the loss of transponders (and consequent loss of spectrum efficiency and satellite service) that will result from the instant Amsat authorizations. The majority's disinterest in the impact of these grants on transponder supply is especially disturbing in view of the growing congestion in these spectrum bands and the Commission's adoption of more demanding technical requirements in recognition of that condition. While I am not insensitive to the equities on Amsat's side, if the holding of this case is that mere economic inconvenience is a basis for granting equitable relief, the Commission's ability to induce technological advances will be seriously undermined.

I respectfully dissent.

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[1] *See Report and Order*, CC Docket No. 81-704, paras. 71 and 79-81 (adopted April 27, 1983).

Satellite Domestic Communications
Satellite Launch Authority
Satellite Orbit

Application to construct and launch an additional space station in Domestic Fixed Satellite Service is granted to meet licensees current traffic projections. Proposal is consistent with Commission's policies and serves the public interest, convenience and necessity.
–AT&T Co.

FCC 83–188

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of the Applications of AMERICAN TELEPHONE AND TELEGRAPH COMPANY For Authority to Launch and Operate a Space Station in the Domestic Fixed-Satellite Service	File Nos. 234-DSS-LA-82 235-DSS-MP-82

ORDER AND AUTHORIZATION

(Adopted: April 27, 1983 Released: August 3, 1983)

BY THE COMMISSION: COMMISSIONER JONES ABSENT

1. The American Telephone and Telegraph Company (AT&T) is requesting authority to launch and operate an additional in-orbit domestic communications satellite. Public notice of these applications was given on November 10, 1981. Petitions to deny were filed by Western Union Telegraph Company (Western Union) and Southern Pacific Communications Company (Southern Pacific). American Satellite Company (ASC) also filed comments.[1] For the reasons discussed below, we deny these petitions and grant AT&T's applications.

2. AT&T is currently using 4;6 GHz COMSTAR domestic satellites leased from COMSAT General Corporation.[2] Four such satel-

[1] The unopposed motions of Southern Pacific for acceptance of its late filed comments and of AT&T for a consolidated date for the filing of its opposition are granted. In a brief letter, COMSAT General Corporation reserved its right to file comments in this proceeding, but did not do so.

[2] COMSAT General Corporation, 44 FCC 2d 444 (1974) and 84 FCC 2d 547 (1981).

lites are currently operated at 3 orbital locations to provide common carrier services through earth stations operated by AT&T, GTE Satellite Corporation, Alascom, Inc. and All America Cable and Radio.[3] Each of these satellites contains 24 transponders with a bandwidth of 36 MHz. The TELSTAR satellite design is capable of 50 state coverage and the satellite mission lifetime is 10 years. In 1980 AT&T was granted authority to replace the COMSTAR D1/D2 and D3 satellites at 95° and 87° West Longitude with its TELSTAR satellites.[4] Action on AT&T's request to launch a third TELSTAR satellite was deferred at that time because COMSTAR D4 would not reach the end of its operational lifetime until 1987. Authority was granted, however, for the third TELSTAR satellite to be maintained as a ground spare. Construction commenced on this satellite in December 1980 and is scheduled to be completed in June 1983.[5]

3. AT&T is now requesting authority to operate the first TELSTAR satellite in a fourth orbital location in order to expand its available system capacity. The company's current traffic projections indicate an immediate need for a fourth orbital location. AT&T plans to offer any common carrier tariffed service on its fourth satellite which it deems appropriate. An orbital location east of 99° West Longitude is requested in order to serve the primary uplinks of the television industry which are located on the east coast of the United States.[6]

4. Western Union and Southern Pacific in their petitions contend that AT&T should be required to make a far more detailed showing of need for a fourth orbital location. ASC requests the Commission to withhold any grant if there is a significant possibility that there will be a shortage of orbit positions. Other issues raised with respect to these proposals and the processing of these applications are fully resolved in the *Report and Order* in CC Docket No. 81–

[3] *See e.g,* American Telephone and Telegraph Company, 42 FCC 2d 654 (1973); GTE Satellite Corporation, 57 FCC 2d 147 (1975); Alascom, Inc., W-P-C-3490, released October 6, 1980; and All America Cable and Radio, 74 FCC 2d 14 (1979).

[4] *See* COMSAT General Corporation, 85 FCC 2d 547 (1981). The first TELSTAR satellite was scheduled to replace COMSTAR D1/D2 at 95° West Longitude in mid-1983, and the second TELSTAR satellite to replace COMSTAR D3 at 87° West Longitude in 1984. AT&T now proposes to delay these replacement launches until July 1984 and May 1985, respectively.

[5] The costs of the project proposed in these applications is estimated to be $95 million for construction and launch. AT&T's financial qualifications to undertake this project is a matter of record before the Commission and are not questioned by any party.

[6] Since the third TELSTAR satellite was originally intended to be used to replace COMSTAR D4, AT&T now plans to file an application at a later date to construct, launch and operate an additional TELSTAR satellite to replace COMSTAR D4. Such an application should, of course, be filed in accordance with today's companion processing order. *See* Memorandum Opinion and Order, FCC 83–185, adopted today.

704, FCC 83–184, and *1983 Orbit Assignment Order*, FCC 83–185, both adopted today, and we will not repeat that discussion here.[7]

5. In separate actions taken today, we have reduced orbital spacings between domestic satellites in the 4;6 GHz bands so that additional satellites might be accomodated in orbit to satisfy growing user demands for domestic satellite service. *See Report and Order, supra.* Consequently, there are now enough orbital positions available to grant the current group of pending applications without comparative hearings under our open entry domestic satellite licensing policies. The only substantive issue presented by this application is whether the demand for AT&T satellite services warrants the award of an additional orbital position for its services. We believe that AT&T has made a sufficiently firm *prima facie* showing that this threshold requirement is satisfied. It projects in its October 25, 1982 supplemental filing a need for 96 transponders by the end of 1983. Moreover, its most recent semi-annual report indicates that in excess of 90% of its operational transponder capacity is being utilized.[8] In light of these representations, we believe that AT&T has made a sufficient showing that the public interest would be served by a grant of its application in accordance with the criteria set forth in our *Report and Order, supra.* Moreover, we reserve the authority to require colocation of COMSTAR and TELSTAR satellites to reduce or eliminate excess spare capacity if these traffic forecasts do not materialize.

6. Accordingly, IT IS ORDERED that Applications File Nos. 234-DSS-LA-82 and 235-DSS-MP-82 ARE GRANTED, and American Telephone and Telegraph Company is authorized to launch and operate its previously authorized TELSTAR satellite in the domestic Fixed-Satellite Service in accordance with the *1983 Orbit Assignment Order*, FCC 83–186, adopted today.

7. IT IS FURTHER ORDERED that American Telephone and Telegraph shall comply with all the requirements of the *Report and*

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[7] We believe that this decision, along with our decision in Domestic Fixed Satellite Services, 90 FCC 2d 1 (1982), *recon.denied*, and the Memorandum Opinion and Order, FCC 83–183, adopted today, are fully dispositive of any arguments raised with respect to the processing of these applications. This also includes issues raised concerning the application of our *1980 Processing Order*, 77 FCC 2d 856 (1980), and any potential hearing rights that might be granted under the *Ashbacker Doctrine*. *See* Ashbacker Radio Corporation v. FCC, 326 FCC 2d 327 (1945). Moreover, our *1983 Orbit Assignment Order*, FCC 83–196, resolves all issues raised by the parties relating to particular orbit assignments.

[8] *See* AT&T Satellite Utilization Report, January 28, 1983. This estimate includes only the COMSTAR D3 and D4 satellites. COMSTAR D1/D2 is used for occasional service and as a spare for the other two satellites. AT&T also claims to be in receipt of orders for over 60 channels for its satellite television service. It has also received requests for satellite audio distribution services and digital satellite services. We recognize, however, that orders do not always translate into paying customers when little, if any deposit, is required in order to be placed on a waiting list.

Order in Docket 81-704, FCC 83-184, and *1983 Orbit Assignment Order*, FCC 83-186, both adopted today, as well as the terms and conditions of all other previous orders and authorizations.

8. IT IS FURTHER ORDERED that, unless extended by the Commission for good cause shown, this authorization to launch and operate an in-orbit satellite shall become null and void in the event the space station is not launched by July 31, 1983, and successfully placed into operation in accordance with the technical parameters and terms and conditions of this authorization.

9. IT IS FURTHER ORDERED that the temporary assignment of any orbital location to American Telephone and Telegraph Company is subject to change by summary order of the Commission on 30 days notice and does not confer any permanent right to the use of the orbitor spectrum. Such a change may be ordered *inter alia* to implement uniform 2° separations, to require colocation of in-orbit satellites in the event of excess spare capacity, or to implement any of the objectives or policies set forth in today's *Report and Order*, FCC 83-184, in CC Docket No. 81-704, or *1983 Orbit Assignment Order*, FCC 83-186. Neither this authorization, nor any right granted by this authorization, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, or by transfer of control of any corporation holding this authorization, to any person except upon application to the Commission and upon a finding by the Commission that the public interest, convenience, and necessity will be served thereby.

10. IT IS FURTHER ORDERED, that the Petitions to Deny filed by Western Union Telegraph Company and Southern Pacific Communications Company ARE DENIED.

11. American Telephone and Telegraph Company is afforded thirty days from the date of release of our *Report and Order, supra*, to decline this authorization as conditioned. Failure to respond within that period will constitute formal acceptance of the authorization as conditioned.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Common Carrier, Interconnection Tariff, Rejection of

AT&T's application for Section 214 authority to offer Basic Packet Switching Service (BPSS) granted, with conditions attached to authorization.
–Basic Packet Switching Service

FCC 83–221

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of AMERICAN TELEPHONE AND TELEGRAPH COMPANY For Authority under Section 214 of the Communications Act of 1934, as amended, to Install and Operate Packet Switches at Specified Telephone Company Locations in the United States.	File No. W-P-C-4841

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

(Adopted: May 12, 1983; Released May 26, 1983)

BY THE COMMISSION: COMMISSIONER JONES CONCURRING IN THE RESULT.

I. *Introduction*

1. Before the Commission is an application for authorization pursuant to Section 214 of the Communications Act, 47 U.S.C. § 214, filed by the American Telephone and Telegraph Company (AT&T) to install and operate "packet facilities" at specified telephone company locations in the United States.[1] The facilities would be employed

[1] A petition seeking denial of AT&T's § 214 application has been filed by the Computer and Business Equipment Manufacturers Association (CBEMA). Tymnet, Inc. (Tymnet) has submitted a petition to deny or, alternatively, to condition the authorization. A late filed petition to deny also was filed by GTE Telenet Communications Corporation (Telenet). The Independent Data Communications Manufacturing Association, Inc. (IDCMA) filed comments regarding AT&T's request which relate to the Commission's Registration Program (47 C.F.R. Part 68). Satellite Business Systems (SBS) filed limited comments concerning Tariff FCC Nos. 267 and 268. Finally, the International Business Machine Corporation (IBM) filed comments. Also before the Commission are reply comments filed by AT&T and the Association of Data Processing Service Organizations, Inc. (ADAPSO), and a letter from IDCMA commenting on information exchange procedures between American Bell Inc. (ABI) and AT&T. In addition, on January

in a new service offering of packet switch facility capacity for use by customers in the construction of private packet networks. AT&T identifies the offering as the Basic Packet Switching Service (BPSS). Also filed with AT&T's Section 214 authorization request were three illustrative tariffs. The first of the tariff filings would revise Tariff FCC No. 270 by setting out initial rates and regulations for BPSS. A second would revise Tariff FCC No. 267 to provide for the connection of AT&T's 56 kbps and 9.6 kbps Dataphone Digital Service (DSS) to BPSS. Finally, revisions to Tariff FCC No. 268 and the 19 Bell Operating Companies (BOC) tariffs would provide for a new offering of a 56 kbps. Digital Central Office Connecting Facility. This facility would be provided between an other common carrier (OCC) terminal location and a telephone company central office for connection to BPSS. Also before the Commission is a petition, filed by the Computer and Business Equipment Manufacturers Association (CBEMA), for limited reconsideration and clarification of the Commission's decision to reject AT&T's March, 1982 offering of BPSS (BPSS decision).[2] On balance, we believe that the public interest would be served by BPSS, and, accordingly, we approve AT&T's request for authorization for this service as discussed below.

II. *Background*

2. The nature of the proposed service and its development are summarized in the BPSS decision. Briefly, in 1978, AT&T sought authority from this Commission to offer the Advanced Communications Service (ACS), an integrated end-to-end service that included packet transport for the carriage of digitized information.[3] The application was later withdrawn so that the service could be redeveloped into separated basic and enhanced offerings according to the guidelines established in our *Second Computer Inquiry* (*Computer II*).[4] The *Computer II* decisions held, *inter alia*, that AT&T could provide basic services but could only offer enhanced services

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27, 1983, CBEMA filed further reply comments in response to AT&T's reply. These late filed pleadings will be considered as informal comments. *Cf.* 47 C.F.R. § 21.30(b). On March 18, 1983 CBEMA also filed a petition to institute a proceeding to establish that packet switching services should be offered in the competitive marketplace as enhanced services under *Computer II*. CBEMA states that such a proceeding will allow the Commission to develop additional factual or policy bases that may be necessary to confirm this decision. Because instituting a proceeding inviting additional public comment on packet switching in general will unreasonably delay Commission action on AT&T's BPSS application, we will not institute the requested proceeding. Accordingly, CBEMA's petition is denied. However, we have considered the points raised in that petition as informal comments.

[2] American Telephone and Telegraph Company, Bell Packet Switching Service, 91 FCC 2d 1 (1982).

[3] *See* Advanced Communications Service, Docket CC79–117.

[4] Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 FCC 2d 384 (1980) (Final Decision), *reconsideration*, 84 FCC 2d 50 (1980), *further reconsideration*, 88 FCC 2d 512 (1981), *aff'd sub nom.* CCIA v.

through a separate subsidiary. On June 10, 1982, the Commission approved the establishment of AT&T's separate subsidiary, American Bell, Inc. (ABI). ABI has since announced that it will provide the enhanced portion of the earlier proposed ACS, now termed Advanced Information Systems (AIS), and that it will interconnect its nodes with the packet transmission services offered by common carriers. On March 1, 1982, AT&T filed proposed revisions to Tariffs FCC Nos. 267 and 268, and a new Tariff FCC No. 270. [5] In its cost support data for Tariff 270, AT&T described the Bell Packet Switching Service (BPSS) as an offering of a dedicated facility, located on AT&T premises, that, when interconnected with other equivalent packet facilities using 56 kbps transmission channels, could provide a private packet transmission network. Access connections to the packet facility ports from users' premises and interconnection between the packet trunk ports could be provided, according to AT&T's filing, by any common carrier through a Digital Central Office Connecting Facility provided by AT&T. Additionally, the revisions to Tariffs 267 and 268 provided for interconnecting DDS transmission facilities suitable for that purpose. In its filing, AT&T noted that ABI was its only customer for BPSS.

3. In the BPSS decision, we rejected AT&T's proposed tariff revisions on the grounds that BPSS, as offered, could create channels of communications and therefore required certification pursuant to Section 214 of the Communications Act, 47 U.S.C. § 214.[6] We also expressed our concern that the BPSS offering appeared to be primarily tailored for the separate subsidiary, as it appeared that BPSS allowed ABI the exclusive use of computer facilities located on AT&T's premises. The decision made it clear, however, that the Commission "continue(s) to support the addition of new and innovative improvements in the basic network" and that "we are not . . . preventing AT&T from providing a basic packet switching service under tariff." BPSS decision at 4. Rather, the decision requested AT&T to readjust its offering in response to the Commission's

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FCC, 693 F.2d 198 (D.C. Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3676 (U.S. Feb. 9,10, 1983) (Nos. 82-1331, 82-1352).

[5] Tariff FCC No. 270, which contains rates and regulations for services other than BPSS, became effective on March 17, 1983, when the Common Carrier Bureau, acting under delegated authority allowed AT&T's Terrestrial Digital Circuits, filing to take effect. In the Matter of American Telephone and Telegraph Company, Terrestrial Digital Circuits, Memorandum Opinion and Order, FCC 83-___ Mimeo No. ±3§, released May ___, 1983.

[6] Section 214 provides, in pertinent part, that:

> No carrier shall undertake the construction of a new line or of an extension of any line, . . . or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation . . . .

concerns when it sought the appropriate certification pursuant to Section 214 of the Communications Act.[7]

4. On November 16, 1982, AT&T filed a "Request for Special Temporary Authority to Test the Bell Packet Switching Service" (STA).[8] AT&T requested that it be allowed to temporarily interconnect, for the purpose of limited joint testing, the ABI premises located in New York, New York and Somerset, New Jersey with packet facilities owned by AT&T. Interconnection of the network would also require eight DDS 56 kbps circuits. Telenet filed comments in opposition to the request. On December 1, 1982, the Commission rejected Telenet's arguments and granted the requested STA, finding that testing at AT&T's own risk would permit the detection and solution of technical problems.[9]

5. In the current filing, AT&T states it has made several changes to BPSS including (1) renaming the service "Basic" Packet Switching Service (BPSS); (2) allowing shared use of BPSS facilities by unrelated users although all ports (access or trunk) are dedicated to a single user; and (3) making available 9.6 kbps ports in addition to the previously offered 56 kbps ports. AT&T also revised its tariffs to revise the rates for AT&T and OCC interconnection to BPSS using DDS facilities and to correct other defects noted by the Commission in its BPSS decision.[10]

III. *Summary of Pleadings*

6. By and large, Telenet, Tymnet and CBEMA's arguments restate positions similar to those filed in response to AT&T's March 1982 application. Generally, the parties argue that BPSS does not comply with principles set forth in the Commission's *Computer II* decisions, in that, as proposed, it is either an enhanced service or an offering of Customer Premises Equipment (CPE). In either case, they urge, AT&T must offer BPSS through its separate subsidiary, ABI. They also argue that BPSS is not a basic common carrier service because it does not contain basic transmission facilities, nor is it offered in a manner that would make it attractive to other than large and heavy users of communications. Telenet, Tymnet and CBEMA also argue that BPSS continues to favor ABI in its tariff construction and general network design. AT&T, in response, claims that the Commission in its BPSS decision has already made an

[7] 91 FCC 2d at 15.

[8] Letter to William J. Tricarico, Secretary, FCC from R.K. Jacobsen, VP, Network Engineering, AT&T (November 16, 1982).

[9] Letter to R.K. Jacobsen from Chief, Common Carrier Bureau (December 1, 1982).

[10] With its application AT&T also included a "Memorandum of Law" in which it argues that BPSS does not create new channels of communication within the meaning of Section 214 of the Act. Because we have already decided that issue in the BPSS decision, we will not further consider AT&T's "Memorandum" here.

explicit and well-founded determination that BPSS is a permissible network service.[11] It argues that petitioners are confusing terms, and notes that under *Computer II*, AT&T, as a regulated entity, is restricted to providing basic services, but that basic services are not so restricted as to involve only those with transmission facilities. AT&T characterizes BPSS facilities not as CPE, but as equipment that could be owned by itself or its fully separated subsidiary. Further, AT&T argues that the fact that ABI will be a major BPSS customer is simply not a reason to prevent AT&T from offering the service.

7. With regard to petitioners' arguments that BPSS is an enhanced service, both Telenet and Tymnet allege that dissimilar terminals will be able to communicate when interconnected by a BPSS network. Both argue that the communications protocol incorporated in BPSS will allow computers supplied by different manufacturers, installed at different points in time, utilizing different electrical levels, transmission speeds and error control procedures to communicate with each other. Telenet offers examples showing that terminals initially built to communicate only with other terminals using special communication protocols, such as Binary Syncronous Communications (BSC) protocol or High Data Level Communications (HDLC)[12] protocol, could now communicate with each other through a BPSS network. Telenet further claims that BPSS is an enhanced service because it allows user options associated with the delivery and control of messages through the network, and because BPSS ports can be either 9.6 kbps or 56 kbps, thereby allowing communication between terminals of dissimilar speed. AT&T responds that differing port speeds at either end of the network does not constitute, of itself, an enhanced service, since speed conversion is fundamental to basic service in the performance of network multiplexing functions. AT&T notes that Telenet compares BPSS to its own packet service and argues that there are material differences between Telenet's service and BPSS. AT&T further states that BPSS complies only with the 1980 CCITT X.25 Recommendation as published in Vol. VIII of the CCITT yellow books[13] and as explicated in AT&T's Technical Reference PUB54010, whereas Telenet's service goes beyond that recommendation. Unlike

[11] AT&T's Reply, at paragraph 9.

[12] BSC and HDLC are two industry accepted protocols that enable digital terminals to communicate with each other. Each protocol defines different elements and procedures necessary for communication. Both protocols achieve the same purpose but are normally incompatible with each other.

[13] CCITT is part of the International Telecommunications Union (ITU) based in Geneva, Switzerland, and is generally recognized as the premier international organization for establishing telecommunications network and operating standards. The standards applicable for the period 1980–84 were published in 1980 and bound in yellow covers. Other periods are bound in different colors, i.e., orange for 1976–80.

BPSS, Telenet's service is said to support device dependent interfaces, carry out protocol conversions and allow for communications between incompatible terminals.

8. A number of petitioners, anticipating that the Commission might approve AT&T's request, propose specific language and conditions that should be included in our authorization. Tymnet proposes that the authorization be conditioned to prevent ABI from using BPSS for a period of 18 months. Tyment argues that this would equalize ABI's advantage gained in obtaining early information from AT&T about the service. Similarly, Telenet proposes that any subsequent Section 214 authorization contain conditions to prevent packet switches from being shared by the BOCs and AT&T. Telenet also proposes that the authorization be conditioned to require that a publically accepted interface standard be adopted to facilitate non-AT&T packet networks connecting to a BPSS network. AT&T responds that Tymnet's concerns about ABI gaining any information advantage are unfounded because AT&T, when it released Technical Reference PUB54010 in September 1981, provided information that allowed enhanced service providers sufficient lead time to accommodate network developments into their service plans. AT&T also contends that Telenet's proposed interconnection condition is premature and should be resolved in the context of network-to-network service arrangements at the time such services are offered. Similarly, AT&T states that because AT&T will not share packet switches with the BOCs, there is no need for Telenet's proposed condition.

9. IBM proposes that our authorization permit the use of BPSS facilities to provide only those services described in AT&T's request. IBM argues that an imprecise grant of the application might cause AT&T to assert that it has "carte blanche" authority to provide any service using the BPSS facilities that it later chooses to offer. Both IBM and CBEMA propose that the language in the authorization should not foreclose Commission jurisdiction over similar future services. The petitioners suggest that this would allow the Commission to review, on an ongoing basis, policy issues where other uses of this type of service may occur. AT&T disagrees and alternatively argues that future policy issues arising in this regard could be adequately handled by the Commission's normal regulatory procedures.

10. Finally, IDCMA in its comments notes that BPSS will increase the use of DDS, which in turn will exacerbate the anti-competitive offering of the Channel Service Unit (CSU), presently part of AT&T's DDS service offering. IDCMA notes that in a separate proceeding (Docket No. 81-216), it takes the position that these units should be provided by the general trade.[14] AT&T

[14] General trade refers to manufactures of telephone facilities unaffiliated with telephone companies.

responds that the outcome of Docket No. 81–216 will not impact the BPSS offering.

IV. *Discussion*

A. *Public Interest Considerations*

11. In our *Computer II* decisions, we have sought to establish a rational and enduring demarcation between basic and enhanced services. We also have sought, as an important public interest objective, to ensure that innovation and improvements will continue to occur in the regulated basic network, and that broadly available basic services will continue to evolve as technology evolves. *See Final Decision*, 77 FCC 2d at 423 ("[the definition of enhanced service] allows the provider of these basic services to integrate technological advances conducive to the more efficient transmission of information through the network . . ."); *Reconsideration*, 84 FCC 2d at 77 ("the benefits of any improvements introduced into AT&T's transmission facilities to accommodate the needs of the subsidiary would become available to all users of the underlying facility.")

12. BPSS as now proposed appears to satisfy this objective. It offers, on a broadly available tariffed basis, a service for the transmission of digital signals utilizing packet switching technology. Much of our concern that as originally proposed BPSS appeared excessively tailored to the needs of AT&T's separate affiliate, 91 FCC 2d at 16–17, has been resolved by the substantial changes made. In our view, the end result is a BPSS offering which appears to comport with our *Computer II* policies, and with our overriding statutory mandates to promote the availability "to all the people of the United States a rapid, efficient, Nation-wide, and world-wide . . . service with adequate facilities at reasonable charges," 47 U.S.C. § 151, and that "the benefits of new inventions and developments may be made available to the people of the United States," 47 U.S.C. § 218.[15] The packet switching technology in certain circumstances may be a more efficient means of transmitting digital signals than has previously been utilized by AT&T, and in our view should be permitted to be introduced in AT&T's facilities.

13. Furthermore, while a number of entities have offered digital transmission services in the past using packet switching technology (*e.g.*, Telenet and Tymnet), their offerings have often been enhanced offerings, in that they support communications among incompatible terminals (and perform code, format and protocol conversion to support this service within their facilities). BPSS as proposed does not do so. If the current pattern continues for the future, the marketplace will require such conversions to support communications among disparate terminals. BPSS can serve as a "building

[15] *See also* 47 U.S.C. § 303(g).

block" for desirable enhanced service offerings by a variety of service providers, including but not limited to AT&T's affiliate, and on a fair basis subject to the regulatory constraints of the Act. We conclude that this is a desirable result.

14. In sum, we conclude that the public interest is served by the offering by AT&T of BPSS as proposed. As is detailed below, we have carefully considered arguments to the contrary made in comments filed in this proceeding, and we have concluded that the comments raise no substantial and material questions.[16]

B. *Basic vs. Enhanced Issues*

15. In our BPSS decision, we described the operation of AT&T's BPSS system. 91 FCC 2d at 5–6 and 13–14. Briefly, subscriber messages are segmented into packets of predetermined bit lengths, and the packets are transmitted over packet switched networks in "bursts" of bits. The transmission of each packet is controlled by capabilities residing in the terminals and in each BPSS network node. In the decision, we considered a number of comments which claimed that the control procedures associated with transmission of the packets, and options which were to be made available to subscribers of BPSS, constituted an offering of enhanced service within the meaning of Section 64.702(a) of our rules. We concluded that "there is no question that *Computer II* permits AT&T to offer a packet switching service such as BPSS in the network as basic service." *Id.* at 15. This conclusion is challenged on three grounds in this proceeding.

16. First, it is claimed that AT&T's BPSS will support communications between terminals utilizing disparate communications protocols, and that in so doing the service will be enhanced within the meaning of Section 64.702(a) of the rules. The definition of enhanced service includes, *inter alia*, "computer processing applications that act on the . . . protocol . . . of the subscriber's transmitted information." As indicated above, Telenet alleges that certain link control protocols, HDLC and BSC, are required to be supported simultaneously in a packet-switched network which conforms to CCITT Recommendation X.25, even if the two protocols are used at different ends of the same communication, which would imply that the network would be performing protocol conversion. While it is

[16] AT&T contemplates that BPSS would be available only if the customer also obtains either a DDS line or a Digital Central Office Connecting Facility, another type of line, from AT&T. Because BPSS would be available only in conjunction with such a line, it is apparent that the service constitutes more than a simple offering of CPE. Thus, although the Commission does not regulate as common carriers the lessors of switching equipment (*e.g.* PBXs) or stand-alone multiplexing equipment, it does regulate communications, i.e., transmission services, such as MTS, that incorporate switching and multiplexing functions. *See* Sections 2(a), 3(a) of the Communications Act.

true that predecessor versions of the CCITT X.25 specification supported two sets of control protocols (and Telenet's own packet-switched network supports both), the current version of X.25, to which BPSS conforms, clearly supports only the HDLC protocol. *See* Section 2.1.2. No reference is made to the alternative BSC protocol, thus it is clear that AT&T has not proposed to support both, or to perform a protocol conversion between the two protocols as part of BPSS.

17. Similarly, Telenet argues that BPSS will support two sets of link access procedures (i.e., sets of protocols) LAP and LAPB, simultaneously, which also in Telenet's view would allow unsimilar terminals to communicate if the two procedures were used at different ends of the same communication. We do not reach this argument here because it is factually incorrect. LAP and LAPB both continue to be specified in the current version of X.25, Section 2.1.1, however, AT&T has not proposed to support both in BPSS. Rather, it has proposed to support only the LAPB protocol. PUB54010, Section 4.2.[17]

18. Second, it is argued that subscribers to BPSS will have certain service subscription options available to them, i.e., the ability to select service to a closed user group, incoming virtual calls only, outgoing virtual calls only, flow control parameters and fast select capability, and that the availability of these options renders BPSS an enhanced service. There is no basis for this claim. Subscribers of basic common carrier services often have service options available to them (pricing options, restricted service options, private line versus switched services, etc.), and the options involved in BPSS are no different from these. Significantly, Telenet does not relate any of these options specifically to the definition of enhanced services in Section 64.702(a) of our rules, and in our view, they cannot do so. None of these represents the type of processing of, or changes to, subscriber information which is reached by the definition.

19. Third, it is argued that although BPSS as currently proposed to be offered may not invoke the definition of enhanced service, the actual processors to be used in BPSS are capable of supporting

[17] A related argument is made by Telenet and Tymnet that in supporting communications at both 9.6 kbps and 56 kbps, which could involve a speed conversion in the BPSS facilities if terminals operating at the two speeds were at different ends of the same communication, BPSS is an enhanced service. In *Computer II*, we acknowledged that intermediate network storage of information during the course of its transmission, to facilitate the transmission, is permissible in a basic service, *see* 77 FCC 2d at 420 and 84 FCC 2d at 55–59. *Computer II* did not preclude a basic network from converting to different transmission speeds. Speed conversion alone, unaccompanied by changes in the format, content, code and protocol, is implemented in principle by the use of such intermediate network storage, and does not involve subscriber "interaction" with stored information. In sum, the speed conversion which may be implicit in the offering of 9.6 and 56 kbps ports in BPSS does not alter the classification of BPSS as basic.

broader capabilities. Because of the possibility that these facilities *might* support enhanced services in the future, it is argued that we should determine that the currently proposed offering is enhanced. We are not persuaded by this argument. Indeed, many electronic central offices today are capable of supporting enhanced services, and on this theory they should not be permitted to provide basic MTS.[18] As is discussed below, we are persuaded by the related argument that evolution of BPSS should be carefully scrutinized to ensure that is is not transmuted in the future into an offering of enhanced service, and for this reason we are specifically conditioning our authorizations herein accordingly.[19]

20. In sum, in our earlier BPSS decision, we examined carefully the contentions of various parties that BPSS, as proposed to be offered, was an enhanced service, and we concluded on the basis of information before us that the proposed offering would be basic. Several parties have filed comments which, in essence, seek reconsideration of that determination. We have carefully analyzed each of their specific arguments and found that they are incorrect, in large measure because they are based on the view that while BPSS as currently proposed to be offered may be basic, it might evolve in the future toward an enhanced service. As noted, this possibility is present in virtually all current basic service offerings inasmuch as they are increasingly implemented through the use of relatively agile stored-program controlled facilities which are capable of being reprogrammed to support the offering of enhanced services. Indeed, it is clear that even the electronic central office facilities which support the offering of conventional telephone service are capable of doing so. We have already acknowledged this potential, and have demonstrated that we will carefully examine new offerings proposed to be made over existing stored-program controlled facilities to ensure that they are not impermissible enhanced service offerings.[20]

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[18] *See* American Telephone and Telegraph Co. (Custom Calling Services II), 88 FCC 2d 1 (1981).

[19] *See* para. 38, *infra.*

[20] In September 1982, CBEMA filed a petition for limited reconsideration and clarification of our BPSS decision. CBEMA asks that we reconsider our finding that BPSS packet switches are basic service transmission facilities subject to Section 214 of the Act, or, in the alternative, that we interpret and reaffirm our decision in light of Computer II. To that end, CBEMA urges that our grant make it clear that the Commission is in no way modifying any of the Computer II criteria for defining basic services. CBEMA argues that (1) the BPSS offering does not involve any code or protocol conversion of subscriber data, but rather, the subscriber's information must be packetized prior to delivery to the carrier according to prescribed X.25 protocol standards; (2) in designing BPSS, AT&T has chosen a specific subset of those protocols in attempting to make its service basic; (3) any user negotiated options are chosen by the subscriber and do not involve the carrier in any conversions between originating and terminating subscriber facilities; and (4) the BPSS facility is fully transparent to the subscriber except as

C. *Computer II Separation Rules Concerns*

21. In the BPSS decision, we said that AT&T's Section 214 filing should focus upon and clear up several concerns raised in the pleadings with respect to *Computer II*.[21] Specifically, we asked AT&T to buttress its claims that BPSS would have general utility, and is not an offering primarily tailored for its separate subsidiary. While we noted that *Computer II* permits AT&T to employ packet transmission technology in the provision of a basic service, we cautioned that because a packet switch is a sophisticated computer facility, when AT&T provides such facilities to its enhanced services subsidiary, it must be careful to comply with the "separation" rules established in *Computer II*. Most of our concern about the BPSS filing centered around the *Computer II* prohibitions against allowing the subsidiary to use in common with AT&T any physical space or property on which transmission equipment or facilities used to provide basic service is located, and allowing the subsidiary to share computer facilities with its parent.[22] We raised these concerns because BPSS, as then structured, appeared to allow ABI exclusive access to computer facilities located in AT&T's central offices to provide ABI's enhanced services. Indications of this included that (1) BPSS was developed for used with AIS; (2) the vague nature of certain tariff provisions suggesting that BPSS was not a service offering directed at customers other than ABI; and (3) multiple parties could not use a single BPSS switch, and thus it would be located in AT&T's central offices and dedicated for the sole use of the separate subsidiary.[23] We asked AT&T to provide in its Section 214 filing additional support for the claim that BPSS was an open service with value and utility to users other than ABI. We noted that if it was not, BPSS could bring about the very problems the Commission sought to avoid when it adopted its separation requirements.[24] For example, AT&T could impose rates for BPSS use of DDS lines that favor ABI over its competitors who secure their own packet switches and also use DDS lines to connect those switches. In addition, cross-subsidization could occur if AT&T were to underprice BPSS, thereby lowering the cost to ABI of providing AIS, and then make up this deficit through other regulated services.

22. In order to address the concerns raised in the Commission's BPSS decision, AT&T has made a number of significant changes to Tariff 270 and to the service itself. The revisions to Tariff 270 alleviate the problems we pointed out that potential customers, who

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necessary to establish the interface to the service. In light of the foregoing discussion, this petition is moot.

[21] 91 FCC 2d at 15.

[22] *Id.*

[23] *Id.*

[24] *Id.* at 16.

would likely be ABI's competitors, would be faced with in ordering service from AT&T.[25] In addition to removing or revising tariff provisions which could discourage potential customers other than ABI, AT&T has made certain changes to the service itself which should make it more attractive to other customers, and thus a more general offering. One such change is that AT&T would now allow unrelated users to share a BPSS facility rather than requiring, as before, a single user to subscribe to an entire device. Tariff 270 now permits a BPSS subscriber to lease as few or as many ports on a BPSS facility as it requires.[26] A second change in BPSS is that 9.6 kbps ports will now be available to subscribers, in addition to previously proposed 56 kbps ports. Through these changes in the BPSS offering, AT&T has lowered the entry threshold for users and broadened the base of appeal for this service. We find these changes to be significant improvements responsive to the concerns raised in the BPSS decision.

23. Another problem raised in our BPSS decision was that AT&T's use of DDS transmission facilities could favor ABI over its competitors who secure their own packet switches and also use DDS lines to connect those switches.[27] Under that scheme, when a DDS customer terminated a DDS line at the premises of a customer, user or OCC, the DDS customer was to be charged $908.00 per month. On the other hand, the charge to terminate a DDS line at an AT&T central office for the purpose of connecting to BPSS would be only $180.00 per month. We determined in the BPSS decision that this rate structure could result in significantly lower overall charges to ABI for DDS connections in its packet network than its competitors

[25] For example, AT&T deleted the provision which allowed it discretion to establish an installation date on a service by service basis, and by which it disclaimed responsibility to the customer if such date was not met. AT&T also removed the provision which afforded it discretion to accommodate customers' requests for special service features and arrangements. The final provision which gave us concern was Section 2.5.6 of the proposed tariff, which gave AT&T the right to require very large deposits as a guarantee that charges would be paid by the customer. While deposit provisions are standard in AT&T tariffs, we noted in the BPSS decision that the deposit could be required where the customer intended to take service only for a "limited period," and that in such cases the deposit could be applied as an advance payment of the customer's bill. These latter provisions did not comport with standard tariff practice. For one, no definition was given for the term "limited time," so the customer would not know the exact meaning of this provision. For another, deposits are not synonymous with advance payments, and making them so could deprive a customer of its rightful interest on the deposit. AT&T has corrected these problems in Tariff 270. In Section 2.6.6, AT&T has deleted the phrase "limited time," and now specifies the advance payment. In addition, AT&T has treated advance payments and deposits as two separate charges in two separate provisions.

[26] Although AT&T does propose a minimum usage charge, the charge does not appear to be of sufficient magnitude to discourage entry on the part of medium-sized customers.

[27] 91 FCC 2d at 16.

would pay for DDS connections to their own packet switches. In so doing, we referred to a letter from the Chief, Tariff Division, Common Carrier Bureau, dated March 10, 1982 on this same subject.[28] AT&T in this filing has eliminated any rate differences for DDS access lines by charging $908.00 per month for all 56 kbps DDS lines.[29] Thus, it has sought to ensure that charges to ABI for DDS connections will be in line with charges ABI's competitors must pay for DDS connections to their own packet switches.

24. In view of the changes to BPSS discussed above, AT&T has moved the BPSS service toward the Commission goal of having a packet service with general utility for the network, rather than an offering with utility only for ABI. As the service matures we are hopeful that it will evolve even further as a general offering.

25. AT&T has not publicly announced plans to develop BPSS into a switched common user offering and we are not requiring it to do so at this time. However, we believe that no technological reasons exist to prevent AT&T from providing a more common user oriented packet switching service without the leasing of dedicated transmission lines. Some carriers already offer similar services and the communications industry is continuing to develop ways to reduce the user's entry threshold for X.25 networks. For example, there are presently proposals under consideration to allow "dial up" access from the MTS network. In addition, manufacturers have recently announced end user terminal component attachments that will interface directly into X.25 networks. We recognize, though, that the economic justification for a common user service might arise from first fulfilling the more specialized needs of large users. However, we believe it not unlikely that in the future, as the service matures, smaller users will find it increasingly attractive. We expect that AT&T will respond to such market demands by adopting tariff changes which would accommodate such smaller users. For example, as already suggested, one way to make BPSS a more generally useful service offering would be to develop it into a fully implemented common user service that could be tariffed on a message use basis. To monitor developments, we order AT&T to report on any expected or proposed changes in BPSS forecast for the coming year. This report must be submitted no less than 60 days in advance of any

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[28] In this letter, it was noted that the Commission's decision in Docket No. 20288, relating to DDS, required that the rate structures which applied to Tariff 260 services also apply to DDS.

[29] This $908.00 per month charge is the rate for a DDS access line currently in effect in Tariff 267. AT&T, in this filing, has proposed to apply this rate, rather than the $180.00 rate initially proposed, to DDS terminations in its central offices for purposes of connecting to BPSS.

proposed change. AT&T may either file this report separately or include it in its yearly Section 214 blanket authorization filing.[30] However, any proposed change included in AT&T's blanket authorization filing may not take effect less than 60 days from the date of that filing. The staff shall instruct AT&T as to the format and content requirements of this report.

26. In response to the petitioners' claims that BPSS is not a common carrier service, but instead is an offering of customer premises equipment (CPE), AT&T argues that such finding would preclude AT&T's provision of commonly accepted basic services such as Common Control Switching Arrangement (CCSA), Enhanced Private Switched Communications Service (EPSCS), Switched Circuit Automatic Network (SCAN) and Central Office Centrex. We agree with AT&T that BPSS is not CPE, but rather, as in the case of the other services mentioned above, part of the network.[31] (See note 16, *supra*, for additional discussion).

D. *Tariff Concerns*

27. While AT&T has corrected the tariff problems we identified in our BPSS decision, AT&T's revised and modified filing contains certain new tariff provisions which raise a number of additional concerns. Because we have in this order resolved our fundamental difficulties with BPSS, we hope to allow the related tariff to go into effect on short notice and thus allow service to the public to begin. We therefore take this opportunity to point out here our remaining specific tariff concerns so that AT&T may take action to solve our problems without lengthy and time-consuming tariff investigation and suspension procedures.

28. Our first problem relates to proposed Section 6.2.3.C, where AT&T would now require a minimum of twelve months notice, in writing, prior to discontinuance of BPSS. This twelve month notice of discontinuance requirement would apply even if a customer has had the service for a number of years. If notice is not given, the recurring charge for service would continue to apply for a period of twelve months from the date AT&T received notice, whether or not

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[30] The blanket filing technique permits AT&T to receive Section 214 authorization for the major part of its annual construction in a single filing. *See* 47 C.F.R. § 63.06.

[31] Notwithstanding the above, however, we intend to scrutinize BPSS once it is actually offered to the public under tariff to ensure that it is indeed a generally useful and available service. We wish to ensure that BPSS does not become a means by which AT&T could favor unreasonably its unregulated subsidiary, ABI. Should BPSS be used almost exclusively by ABI, serious questions would arise as to whether the service was communications common carriage at all. *See* NASA, 61 FCC 2d 56 (1976). Should BPSS be used almost exclusively by ABI, the Commission will consider taking further steps to ensure that there are no unreasonable barriers, tariff or otherwise, blocking the ability of the general public to use this service.

the customer continued to take service. Such a notice period would appear to severely limit a BPSS customer's ability to make rational economic decisions based upon the availability of alternative offerings, technologies and prices, and would, furthermore, discourage new customers from taking the service. By holding a customer to the service for a twelve month period, regardless of use, AT&T would in effect restrict the ability of its customers to take advantage of other carriers' similar offerings that might be available at lower prices, or that might provide more efficient and economical service because of new technology.

29. Furthermore, AT&T in this filing has not explained how this notice requirement is related to costs. Nor has it given any justification for the need for twelve months notice from an operational standpoint. Another difficulty we have with this requirement is that AT&T is silent as to whether, if replacement customers for BPSS facilities are available, a subscriber would still be bound to pay for service for the full twelve months following notice. Finally, AT&T says that its facilities plans are updated monthly. Thus, it would seem that AT&T's plans for reuse of facilities should be subject to demand considerations, and that AT&T has the ability, when demand warrants, to make facilities available in less than twelve months time.

30. We are aware that the marketing problem which AT&T seeks to overcome with this twelve-month notice provision is a common one, though varying in degree, to all private line or dedicated services. With the exception of the recently filed Terrestrial Digital Circuits (TDC) tariff,[32] which became effective March 17, 1983, however, AT&T has imposed no similar tariff conditions on other private line services such as Series 2000 and 3000 voice-grade channels, CCSA or other services contained in Tariff 260. Even in the case of TDC, moreover, the required notification period prior to termination is three months. In view of the fact, therefore, that there are other ways for AT&T to recover costs associated with time lapses caused by service discontinuance, we are very concerned that the ratemaking techniques proposed here will pose a significant obstacle to market entry, arbitrage,[33] and particularly, achievement of our stated goal of making BPSS a more generally useful service. For all

[32] *See* note 5, *supra*.

[33] We believe the twelve-month notice requirement would discourage resale, sharing and arbitrage. Arbitrage, in the Commission's regulatory scheme, is seen not as a means of developing vested interests, but as a way of bringing rates into line with competitive pricing patterns. Once the forces of arbitrage and/or sharing make the maintenance of monopoly-type rates infeasible, we expect that the initiator of these rates will eliminate the discrimination and the opportunity for arbitrage. In such circumstances, the reseller would suddenly have nothing to offer and its customers would migrate, as rapidly as possible, back to the underlying carrier's service. Under AT&T's proposal, at such point in time the

of the above reasons, we have significant problems with the proposed twelve-month notice requirement. We believe that AT&T can propose a substantially shorter notice period that would partially accomplish its marketing goals without unduly interfering with Commission policy.

31. A second new tariff provision which we believe has not been justified and could discourage potential users is proposed Section 6.2.4.A. That section states that if a customer's requirement for ports at one BPSS location exceeds the available capacity of that switching arrangement, an additional switching arrangement may be required in order to provide the requested number of ports. When this occurs, trunks are required to connect the newly installed switching arrangement to the existing switching arrangement. Under AT&T's tariff scheme, the last customer to gain access to a BPSS switch must pay for the trunk which AT&T claims is required to connect the two BPSS switches. It would appear, on the basis of information before us, that these intermachine trunks would be useful for other functions in addition to satisfying the dedicated communications requirements of a single customer. Even if this were not the case, we would question whether it is reasonable to charge one customer more than another even though the two would effectively receive the same service, i.e., the same number of switching ports with the same functional capabilities. In view of the fact that BPSS is represented as a general tariff offering this practice raises questions of equity and discrimination. We expect therefore that AT&T will explain why it believes the above practice to be reasonable, or, failing to do so, will eliminate it and distribute the attendant costs over all customers.[34]

32. Review of the support material AT&T provided with its illustrative tariffs raises two methodological concerns. Our first concern relates to AT&T's support for the BPSS minimum monthly usage charge.[35] As proposed, this monthly charge is $1,150 per access port, or 852 kilopackets of usage. AT&T developed this charge by determining the average monthly revenue per switch over a three-year planning period, from 1983–1985, and then dividing that amount ($128,800) by the average number of available access ports (112) per switch over the 18 month period from 1983 to mid-1984. According to AT&T's own projections, however, the number of access ports per BPSS switch is to be increased through the end of 1985, and this increased number of ports would raise the average number of

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reseller would be left without customers and yet would face the necessity to pay for a full year of unused service.

[34] AT&T should also revise Section 6.2.6.B to indicate whether the minimum monthly usage charge required by Section 6.2.4.B.4 applies when a customer tests its equipment before beginning service.

[35] *See* Volume 2, Section 5 of Basic Packet Switching Service, Description and Justification, November 1982.

ports per switch to 115, consequently lowering the average monthly charge. Thus, AT&T's use of different time periods to derive average monthly use per access port is clearly erroneous. In filing its BPSS tariff offering, AT&T should correct this methodology and use the same time period to determine the average number of access ports and the average monthly revenue.[36]

33. The second methodological problem relates to the development of the minimum usage charge, one purpose of which is to ensure that the revenue requirement necessary to cover AT&T's switch investment and expenses will be recovered even if no usage occurs. In deriving this charge, AT&T has simply divided the average monthly switch revenue requirement by the number of access ports. We believe that this methodology sets the minimum usage charge at a significantly higher level than is needed to guarantee AT&T's revenue requirement. This is so because many access ports can be expected to substantially exceed the minimum usage level, thereby contributing more than an average amount of revenues. If customers were assessed the minimum usage charge for all remaining ports, even if they did not have the average amount of usage, AT&T would have realized more than its total BPSS switch revenue requirement. Therefore, AT&T could safely reduce the minimum usage requirement, a measure which would also have the salutory effect of lowering the entry threshold to potential BPSS customers. A preferable way to compute the minimum charge would be to construct a distribution of usage and develop rates based on that distribution, such that the aggregate revenues equal the total BPSS switch revenue requirement. In filing its revisions to Tariff 270, we expect AT&T to conduct such an analysis or demonstrate why its current method is appropriate.

34. Finally, with respect to tariff issues, we note that AT&T has proposed revisions in recognition of the Commission's concerns regarding potential imbalances in rates between DDS connections to BPSS, and DDS connections to packet switches located on customer premises. These revisions would provide for identical charges whether a DDS channel is terminated at the premises of a customer or within a telephone company office for connection to BPSS. This rate structure is said to ensure equal treatment of ABI and its competitors in the provision of DDS by AT&T. We consider this to be an extremely important change and we would be quite concerned if AT&T, at a later date, attempted to reinstitute different pricing techniques for BPSS terminations in the central office and customer premises terminations. To understand our concern here, some background is necessary. Private line service, as defined by the

[36] A rough calculation indicates that by considering the addition of these ports, the proposed minimum monthly usage charge would be reduced by about $30 per access port.

telephone company for many years, is the offering of a dedicated channel extending between and among service points designated by the customer. In certain cases, one of the points or locations designated by the customer is an AT&T central office. For example, a CCSA switch located in the telephone company central office is considered a customer designated channel termination point. Historically, rates and rate structures for interstate private line services have generally not differentiated between customer and telephone company channel termination points. In other words, the rate has been the same to terminate a channel at a telephone company office as for any other customer designated location. As noted above, in its March 1982 BPSS proposal, AT&T departed from this historical ratemaking practice by devising a pricing structure which singled out telephone company points for special rate treatment.

35. We questioned this pricing approach in the BPSS decision for two reasons. First, we believe that there are significant public interest concerns if AT&T merely singles out BPSS central office terminations for independent rate treatment, while charging a single averaged rate for all other terminations.[37] The second reason which prompted us to criticize AT&T's rate structure was our recognition that ABI was likely to be at least the principal user of BPSS for the immediate future. Since any rate advantages accorded BPSS would immediately inure to the benefit of AT&T's subsidiary, AT&T had a clear incentive to discriminate in favor of BPSS when pricing the associated private line channels to the detriment of other enhanced services providers who also rely on AT&T transmission services. We were therefore concerned that AT&T's rate structure could undermine the separation policy objectives of *Computer II*.

36. In addition to finding that AT&T's modifications to the BPSS tariff should make the service more attractive to potential customers other than ABI, our conclusion that the public convenience and necessity requires us to grant AT&T's application also rests upon the elimination of special rate treatment for the BPSS channel termination. Thus, as indicated above, we would have considerable problems if AT&T were later able to implement a DDS rate structure which gave special treatment to BPSS terminations.[38]

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[37] It appeared, furthermore, from AT&T's initial filing that the $180 charge would have applied even in cases where the BPSS machine and the DDS channels terminate at different central offices.

[38] Our concern here should not viewed as disallowing separate charges for service functions—*e.g.*, special testing, intra-office or cross-office connections—performed at the central office pursuant to a customer's request. Also, as competition in the marketplace evolves, our overall policies on ratemaking and interconnection will be continuously monitored to insure that a fair equilibrium exists which does not unreasonably disadvantage any competitor, including AT&T.

E. *Other Issues*

37. We consider now the various proposals made by petitioners to condition AT&T's Section 214 authorization. Telenet proposes that our grant restrict the sharing of BPSS facilities between AT&T and the BOCs. Telenet argues that AT&T-BOC sharing would preclude AT&T's competitors from having equal access to the BOC portion of the BPSS facilities. Because AT&T has indicated in its Reply that it does not intend to share BPSS facilities with the BOCs, it is not clear that such a condition is needed. Any future BPSS sharing decisions would be subject to full regulatory scrutiny. Telenet also proposes that we include language in our grant to require that interconnection of BPSS with other packet networks be accomplished by a publicly accepted interface standard such as CCITT's X.75 recommendation.[39] Because no equal access or interconnection policy for digital and packet networks has been implemented, it would be inappropriate to adopt the proposal offered by Telenet. Moreover, this issue is now the subject of General Docket No. 80–756, and is thus more appropriately considered in that proceeding.[40] Accordingly, we reject Telenet's proposed condition.[41]

38. In its comments, IBM proposes that we limit our grant of AT&T's authority to those specific services described in the application. IBM argues that an imprecise grant at this time may cause AT&T to assume that it has "carte blanche" authority to provide any service using BPSS facilities it chooses. We are aware that the 3B20 processor used in BPSS is a versatile, programmable instrument that might be configured through software changes to provide services that as yet have not been contemplated. Considering the competitive environment, the limited regulatory control of current standards organizations in the United States, and the evolutionary response of standards to new technology, we would expect that the nature of BPSS services could change. The impact of such services could require Commission attention. At the very least, the public interest requires that the Commission be afforded an opportunity to examine new BPSS service offering in light of the competitive environment at the time such services are contemplated.[42] We anticipate that the means for review of such proposals is through Section 214. Therefore, we will restrict AT&T's BPSS offering to those services

[39] Terminal and Transit Control Procedures and Data Transfer System on International Circuits Between Packet Switched Data Networks. FASCICLE VIII.3 - 1980 CCITT Yellow Books.

[40] Digital Communications Protocols, Docket No. 80–756, Notice of Inquiry, 83 FCC 2d 218 (1980).

[41] We need not consider in this proceeding IDCMA's comment concerning the Customer Service Unit as part of AT&T's DDS service offering. This matter is currently under consideration in Docket No. 81–216.

[42] *See* MCI Telecommunications Corp. v. FCC, 561 F.2d 365 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978) (Execunet I).

described in its August 1981, PUB54010 Technical Publication. We also believe this condition satisfies CBEMA's concern regarding Commission jurisdiction to consider further service offerings.[43]

39. In our BPSS decision, we found that BPSS could create channels of communications within the meanings of Section 214(a) of the Act, and we therefore required that AT&T apply for certification pursuant to Section 214 of the Act. In this proceeding, which is in response to AT&T's Section 214 application, we make the requisite public interest finding with regard to BPSS. Implicit in our acceptance of the application for filing, and by our discussion herein, we find that BPSS is a basic service under Section 64.702 of our rules.

V. *Conclusion*

40. Our finding that grant of this application will serve the public interest, convenience and necessity is the result of a balancing of several considerations. See paras. 11–14 supra.

41. Having reviewed and considered AT&T's request for authority to provide BPSS, as well as the arguments offered by the several petitioners, we find no technical or legal reasons that can be construed as violations of our *Computer II* policies.

42. Accordingly, in view of the considerations expressed above, IT IS ORDERED that the petitions to deny filed by CBEMA, TYMNET and TELENET ARE DENIED.

43. Further, IT IS CERTIFIED, subject to the conditions in paragraphs 25 and 38 above, that the public convenience and necessity would be served if the Basic Packet Switching Service is offered as part of the basic network service as proposed in application W-P-C-4841 and as described in PUB54010, August 1981. Therefore, IT IS ORDERED, pursuant to Section 214 of the Communications Act, that the American Telephone and Telegraph Company IS HEREBY AUTHORIZED to provide the services as specified in the captioned application.

44. IT IS FURTHER ORDERED, that the September 1982 petition for limited reconsideration and clarification filed by CBEMA is DISMISSED AS MOOT (*See* Note 20, *supra*), and that the March 1983 petition for rulemaking filed by CBEMA IS DENIED (See note 1, *supra*).

45. The applicant is afforded 31 days from the date of release of this order to decline this authorization as conditioned. Failure to

[43] Tymnet also proposes that, to minimize the effects of AT&T's disclosure of information to ABI, the separate subsidiary be barred from using BPSS for a period of eighteen months, or until a competitor of ABI uses BPSS, whichever is less. The Commission has recently resolved this argument in a separate proceeding that clarifies the Computer II disclosure rule. Computer and Business Equipment Manufacturers Association, Report and Order, FCC 83–182, Mimeo No. 33209, at paragraphs 66–68, released May 9, 1983.

respond within that period will constitute formal acceptance of the authorization as conditioned.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Application, Filing
Consolidation of Case for Hearing
Cut-off rules

Where an application filed late because air carrier could not provide next day delivery due to grounding at an intermediate stop, "unusual and compelling circumstances" are demonstrated to warrant waiver of Sections 73.3572(c) and 1.227(b) of the Rules.
-Caldwell TV Associates, Ltd.

FCC 83-257

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of	
CALDWELL TELEVISION ASSOCIATES, LTD.	ARN-820217KE
Caldwell, Idaho	
For a Television Construction Permit	

MEMORANDUM OPINION AND ORDER

(Adopted: May 26, 1983 Released: June 2, 1983)

BY THE COMMISSION: COMMISSIONER FOGARTY NOT PARTICIPATING; COMMISSIONERS JONES AND DAWSON DISSENTING; COMMISSIONER SHARP ABSENT.

1. On December 10, 1981, Benjamin B. Moore (BPCT-811210KE) filed an application for a new commercial television station to operate on Channel 9 in Caldwell, Idaho, and was assigned a cut-off date of February 16, 1982. Canyon Communications (BPCT-820216KF) and Cascade Broadcasting Group, Ltd. (BPCT-820216KH) filed timely competing applications by that date. On February 15, 1982, Caldwell Television Associates, Ltd. (CTA) delivered the above-captioned application to Purolator Courier Corporation, an air express courier service in Chattanooga, Tennessee; however, dense fog forced the closing of the Columbus, Ohio, airport, an intermediate stop for Purolator, and next day delivery to the Commission was not possible.[1] The application was ultimately delivered at 8:50 AM the following day (February 17); however, the staff returned it as untimely filed on February 25. On March 29, 1982, CTA sought reconsideration of that action, arguing: (a) that it had done every-

[1] All this information is supported by affidavits from persons with actual knowledge of the facts.

thing required in order to assure that the application would be timely filed; (b) that acceptance of the application would not have disrupted the Commission's processing of the Caldwell applications, since they had not yet been designated for hearing; and (c) that acceptance of its application would be consistent with Commission precedent.

2. On September 23, 1982, the Broadcast Bureau, in denying CTA's petition, noted that Section 73.3572(c) of the Commission's Rules provides for the periodic release of public notices listing television applications which have been accepted for filing and providing cut-off dates by which all mutually exclusive applications must be filed. The Bureau found that Section 73.3572(c) has been strictly enforced, with waivers granted only in "unusual and compelling circumstances," and CTA had not shown the existence of such circumstances here. *Prairie Broadcasting Co.*, 47 F.C.C. 2d 373, 377 (1974). Consequently, the Bureau denied reconsideration.

3. CTA has filed an application for review of the Bureau's September 23 action and, pending its resolution, requested stay of further processing of the other applications, including their designation for hearing.[2] Our cut-off rules are to be strictly enforced with waivers granted only in unusual and compelling circumstances. A prerequisite to such a waiver is that an applicant demonstrate that it has exercised reasonable diligence. Any tardiness must be attributable to circumstances beyond the applicant's control. *Wright County Broadcasting Co.*, 13 R.R. 2d 1251 (1968); *Pictronics, Inc.*, 32 F.C.C. 2d 325 (1971).

4. In this case, we find that CTA did exercise reasonable diligence to assure timely delivery of its application. On the day before the cut-off date, CTA delivered its application to Purolator in sufficient time for that company to deliver it to the Commission the next day under normal circumstances. While it may have been more prudent for CTA to have allowed extra time for unforeseeable delays in delivery, certainly severe weather conditions in another part of the country could not have been reasonably anticipated and constitute circumstances beyond the applicant's control. Consequently, we believe that "unusual and compelling circumstances" have been demonstrated to warrant waiver of Sections 73.3572(c) and 1.227(b)[3] of the Commission's Rules and grant of CTA's application for review.

5. We wish to take this opportunity to reaffirm our intent to

[2] CTA's application for review and request for stay were filed on October 28, 1982, a Thursday. The following Tuesday, November 2, 1982, the other applications were designated for hearing without the knowledge that the application for review and request for stay had been filed. The hearings are not scheduled to begin until April, 1983.

[3] Section 1.227(b) provides that no application will be consolidated for hearing with previously filed applications unless the application is tendered for filing by the cut-off date.

continue to enforce strictly the cut-off provisions of our rules and expect all applicants and their counsel to adhere thereto. The rules afford all parties, be they located in Washington, D.C. or elsewhere, adequate time to submit their applications, amendments, and pleadings in a timely manner. We caution parties who wait until the last possible day to effect delivery of their submissions from out-of-town, based on the "guarantees" of all courier services that they run a considerable risk that delays in delivery will render their filings untimely. Absent unusual and compelling circumstances, a party's sole reliance upon the "guarantee" of these organizations would be misplaced and would not excuse the consequences of its untimely filings.[4]

6. Since our action here resolves the necessity of ruling on the petition for stay, it will be dismissed as moot; however, the presiding Administrative Law Judge in the proceeding involving the other Caldwell applications may take this Order into consideration in the setting of hearing dates.

7. Accordingly, IT IS ORDERED, That CTA's application for review IS GRANTED.

8. IT IS FURTHER ORDERED, That the petition for stay filed by CTA IS DISMISSED as moot.

9. IT IS FURTHER ORDERED, That Sections 73.3572(c) and 1.227(b) of the Commission's Rules ARE WAIVED.

10. IT IS FURTHER ORDERED, That in due course, pursuant to Section 73.3522 of the Rules, CTA's application shall be accepted for filing and placed on an appropriate "B" cut-off list and, thereafter, designated by the Chief, Mass Media Bureau for a consolidated hearing.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

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[4] We note that we have in preparation a Notice of Proposed Rulemaking designed to explore alternatives to the present rule that could remove the uncertainty in situations similar to the instant case, including a "mail box rule."

Reconsideration, Petition for, Denial of

Petition for reconsideration of Review Board decision, 93 FCC 2d 643, denied. Petitioner essentially reargues the points it previously made.
–Cannon's Point B/cing Co.
BC Docket No. 81–306

FCC 83R–38

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
CANNON'S POINT BROADCASTING COMPANY St. Simons Island, Georgia	BC Docket No. 81–306 File No. BPH-800714AK
JAMES U. STEELE St. Simons Island, Georgia	BC Docket No. 81–307 File No. BPH-800930AE
DALE BELL St. Simons Island, Georgia	BC Docket No. 81–309 File No. BPH-801003AF
For Construction Permit for a New FM Broadcast Station	

MEMORANDUM OPINION AND ORDER

(Adopted: May 12, 1983: Released: May 13, 1983.)

BY THE REVIEW BOARD:

1. On April 28, 1983, Cannon's Point Broadcasting Company filed a petition for reconsideration of our Decision, FCC 83R-22, released March 29, 1983, which affirmed the ALJ's selection of Dale Bell as the best comparative applicant in this proceeding, *see* Initial Decision, FCC 82D-58, released August 17, 1982. Our Decision placed Cannon's Point last in the overall comparison because of the clear quantitative integration superiority of the other applicants. Cannon's Point now requests a moderate comparative preference because of its previous efforts as the successful petitioner in the rulemaking proceeding which culminated in the assignment of Channel 224 to St. Simons Island, and by virtue of the fact that its application

was filed first. Such a preference would be unprecedented and is not supported here by reference to any pertinent Commission policy objective. Furthermore, petitioner's reliance on *Kentucky Broadcasting Corp., Inc.*v. FCC, 174 F.2d 38 (D.C. Cir 1949), is misplaced. That case held that the filing priority of applications may *not* be the controlling factor in determining which mutually exclusive application would best serve the public interest. Petitioner's other arguments, which pertain largely to the integration factor, have been thoroughly considered and resolved by the Board in its Decision. See paragraphs 9–13 thereof. Because it is well-established that reconsideration is not available "merely for the purpose of again debating matters on which the [deciding body] has once deliberated and spoken," *WWIZ, Inc.*, 37 FCC 685, 686 (1964), *aff'd sub nom. Lorain Journal Co.*v. *FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966), we decline to rehash these issues again.

2. ACCORDINGLY, IT IS ORDERED, That the petition for reconsideration filed April 28, 1983 by Cannon's Point Broadcasting Company IS DENIED; and

3. IT IS FURTHER ORDERED, That the petition for extension of time in which to file opposition pleadings, filed May 10, 1983 by James U. Steele, IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION
JEROLD L. JACOBS, *Member, Review Board*

Cellular Communications Systems
Domestic Public Land Mobile Radio Service
Mobile Radio Service, Cellular Applications

Applications for Review of staff actions returning amendments to cellular applications as major granted. Application granted in part concerning amendments remanded to the Common Carrier Bureau and denied in all other respects.
–*Cellular Communications Systems*

FCC 83–286

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of MID-AMERICA CELLULAR SYSTEMS, INC. For construction permits to establish cellular systems operating on frequency Block A in the Domestic Public Cellular Radio Telecommunications Service to serve the Kansas City, Missouri and Kansas; New Orleans, Louisiana; and Dallas-Fort Worth, Texas modified Standard Metropolitan Statistical Areas	File No. 26137-CL-P-(8)-82 File No. 26133-CL-P-(4)-82 File No. 26158-CL-P-(5)-82

MEMORANDUM OPINION AND ORDER

(Adopted June 22, 1983 Released June 24, 1983)

BY THE COMMISSION: COMMISSIONER FOGARTY NOT PARTICIPATING.

1. Presently before the Commission are two Applications for Review filed by Mid-America Cellular Systems, Inc. in three markets; Kansas City, New Orleans and Dallas-Fort Worth. The Applications For Review challenge actions taken by the Chief, Mobile Services Division, Common Carrier Bureau (Bureau)[1] in which amendments to MACS' applications in all three markets were returned as major and unacceptable for filing. Responsive pleadings have also been filed. All of the Applications for Review will be disposed of in one order since identical issues were raised in all three markets.

[1] As explained below, the Commission has delegated to the Chief, Common Carrier Bureau, authority to act on the matters involved here in Part 0 of the rules. The Bureau Chief has subdelegated such authority to the Division Chiefs by Order released April 28, 1981, 46 Fed. Reg. 26, 173 (1981).

2. Having reviewed the pleadings, prior decisions, and applicable Commission precedent, we conclude that the Bureau has the authority to return cellular amendments which are major or unacceptable for filing. The Commission in its *Memorandum Opinion and Order on Reconsideration*, 89 FCC 2d 58 (1982), at para. 69, and in Section 22.23(c)(1) of the rules, established the classifications and guidelines for cellular amendments.[2] The Common Carrier Bureau has delegated authority to apply the classifications and guidelines to all amendments tendered for filing as well as authority to reconsider and reaccept previously returned amendments. Based on the cellular rules applicable at the time that MACS' amendments were filed, the Bureau properly returned the amendments as major and unacceptable for filing. Nothing in the pleadings before us persuades us that the Bureau exceeded its delegated authority or acted on matters presenting novel questions of fact, law or policy.

3. However, subsequent to the Bureau's return of the MACS amendments, we stated in *Advanced Mobile Phone Service, Inc.* (Chicago Order), 91 FCC 2d 512 (1982) that inflexible application of the rules in the 30 largest markets would not be in the public interest. Thus, we ordered several applicants to file major amendments to nonconforming cellular applications. In addition, we recently modified the rule regarding changes in the Cellular Geographic Service Area (CGSA) to classify only increases in the CGSA as major changes.[3] In light of our change in policy as well as the recent amendment of Rule Section 22.23(c)(1), we will remand the amendments at issue to the Common Carrier Bureau, Mobile Services Division for further consideration and appropriate action and grant the Applications For Review in all three markets to this extent. The Applications For Review will be denied in all other respects.

4. Accordingly, IT IS ORDERED that the Applications for Review filed by Mid-America Cellular Systems, Inc. ARE GRANTED to the extent set forth above, and DENIED in all other respects.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

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[2] Section 22.23(c) states that amendments will be classified on an *ad hoc* basis and then goes on to list certain types of amendments that are "major", including any change in a Cellular Geographic Service Area. This particular provision, Section 22.23(c)(d), was recently amended to classify only increases in the Cellular Geographic Service Area as "major" changes. Order FCC 83–161, released April 22, 1983.

[3] *See* n. 2, *supra.*

Common Carrier, Interconnection, Customer-Provided Equipment
Competition, Common Carriers
Deregulation

Commission adopted Notice of Proposed Rulemaking proposing procedures for the detariffing of embedded customer premises equipment owned by the Bell System, independent telephone companies, and record carriers.
–Computer II Implementation
CC Docket No. 81–893

FCC 83–181

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of Procedures for Implementing the Detariffing of Customer Premises Equipment and Enhanced Services (Second Computer Inquiry)	CC Docket No. 81–893

NOTICE OF PROPOSED RULEMAKING

(Adopted: April 27, 1983 Released: June 21, 1983)

BY THE COMMISSION: COMMISSIONER FOGARTY NOT PARTICIPATING: COMMISSIONER JONES ABSENT; COMMISSIONER SHARP CONCURRING IN THE RESULT.

I. INTRODUCTION

A. *Background*

1. In *Second Computer Inquiry*,[1] this Commission decided in principle to detariff embedded customer premises equipment (CPE) and reserved resolution of the details of such detariffing to other proceedings.[2] Underlying our decision to detariff CPE was our recognition that competitive market forces would promote the

[1] Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 FCC 2d 834 (Final Decision), *reconsideration*, 84 FCC 2d 50 (1980) (Reconsideration Order), *further reconsideration*, 88 FCC 2d 512 (1981) (Further Reconsideration Order), *aff'd sub nom.* CCIA v. FCC, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 51 U.S.L.W. 3826 (U.S. May 16, 1983) (Nos. 82–1331 & 82–1352).

[2] Customer premises equipment includes all equipment provided by common carriers and located on customer premises except overvoltage protection equip-

widespread availability of affordable CPE more effectively than the traditional practice under which common carriers provided CPE pursuant to rate-of-return regulation. In order to achieve a competitive marketplace, we required carriers to offer detariffed CPE separate and apart from regulated operations. For the Bell System to participate in CPE markets, we imposed the additional requirement that the American Telephone and Telegraph Company (AT&T) provide CPE through a separate subsidiary.[3]

2. We recognized that the issues relating to the removal of costs associated with existing in-place CPE were substantially more difficult to resolve than those relating to new CPE offerings. Thus, we created a "bifurcated" transition plan separating CPE into two categories, new and embedded. New CPE, which includes all CPE acquired by a carrier or manufactured by an affiliated entity after January 1, 1983, may not be offered under tariff. Carriers could continue to offer embedded CPE, which is defined as "equipment or inventory which is tariffed or otherwise subject to the jurisdictional separations process as of [January 1, 1983]", under tariff during a transition period until the manner of detariffing the embedded equipment is determined in this proceeding. *Further Reconsideration Order*, 88 FCC 2d at 526. The length of any transition period during which embedded CPE would continue to be offered under tariff was one of the issues also to be addressed in this proceeding. *Reconsideration Order*, 84 FCC 2d at 67. This *Notice of Proposed Rulemaking* (hereinafter *Notice*) will address these issues as they relate to AT&T, the independent telephone companies, the international record carriers (IRCs), and the Western Union Telegraph Company (Western Union).[4]

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ment, inside wiring, coin-operated or pay telephones, and multiplexing equipment used to deliver multiple channels to the customer. Reconsideration Order, 84 FCC 2d at 61 n.10.

[3] Under the terms of the Modification of Final Judgment (MFJ) entered in United States v. American Telephone & Telegraph Co., 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom.*Maryland v. United States, 51 U.S.L.W. 3628 (U.S. Feb. 28, 1983) (No. 82-952) (hereinafter United States v. AT&T), AT&T must divest itself of all the Bell Operating Companies (BOCs) except Cincinnati Bell, Inc. (CBI) and Southern New England Telephone Company (SNET). Because of the changed circumstances created by the MFJ we recently concluded that there is no longer a need to require CBI and SNET to establish separate subsidiaries for providing CPE. Motion of Cincinnati Bell Inc. for Declaratory Ruling To Remove Uncertainty of Its Status Under the Commission Decisions in the Second Computer Inquiry, Docket No. 20828, Memorandum Opinion and Order, FCC 83-74 (released Feb. 25, 1983). The MFJ has also caused us to visit the question of whether, after divestiture, there will be a need to require the BOCs to provide CPE only through separate subsidiaries. Policy and Rules Concerning the Furnishing of Customer Communications Services by the Bell Operating Companies, CC Docket No. 83-115, Notice of Proposed Rulemaking, FCC 83-71 (released Mar. 4, 1983).

[4] It should be noted that this proceeding does not apply to embedded CPE which is subject to action taken by the Commission in American Telephone & Telegraph Co., Memorandum Opinion and Order, FCC 82-580 (released Jan. 25, 1983), which

3. The bifurcated approach to detariffing CPE was determined to be necessary because several issues of considerable difficulty had to be resolved with respect to the embedded base, whereas the same problems were either non-existent or of considerably less importance for new CPE. First, we sought to minimize possible dislocations to existing customers which could flow from our detariffing decision. *Further Reconsideration Order*, 88 FCC 2d at 514. Second, questions relating to the valuation of embedded CPE as well as the accounting mechanisms required to remove the embedded CPE investment from regulated books of account had to be resolved. *Id.*at 520–21. Third, questions relating to the effect upon competition in the CPE market caused by the transfer of AT&T's embedded CPE to a competitive venture needed to be resolved. *Id.*at 524. It is these questions which are addressed in this proceeding.

B. *Notice of Inquiry*

4. We began this proceeding through the release of a *Notice of Inquiry* on April 13, 1982. *Procedures for Implementing the Detariffing of Customer Premises Equipment and Enhanced Services (Second Computer Inquiry)*, CC Docket No. 81–893, 89 FCC 2d 694 (1982) (hereinafter *Notice of Inquiry*). The *Notice of Inquiry* requested interested parties to submit comments "address[ing] 'issues of capital recovery and asset valuation, alternative mechanisms by which transition to an unregulated CPE environment may be achieved, and the appropriate time period for removal of embedded CPE investment from separations and a carrier's rate base.'" *Id.*at 695 (quoting *Reconsideration Order*, 84 FCC 2d at 69). The *Notice of Inquiry* described four options which could be used separately or in combination to remove embedded CPE from a carrier's rate base:

(1) The sale of the CPE to the customer using it.

(2) The transfer of CPE to the carrier's untariffed service or, in the case of AT&T, its sale to a separate subsidiary.

(3) The sale of CPE to a third party.

(4) Retention of the equipment in tariffed service until it is fully retired.

*Id.*at 696–97. The *Notice of Inquiry* sought comments regarding how these options could most effectively be used.

5. We also addressed the issue of asset valuation. We tentatively concluded that any sale or transfer of this embedded CPE should be at a price equal to its "economic value," which we defined to be "the maximum amount the carrier would be willing to pay for that equipment if, instead of owning it, the carrier had the opportunity to buy it." *Id.*at 697. We also recognized the need to adopt either a

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granted waivers from Second Computer Inquiry requirements consistent with the provisions of the Telecommunications for the Disabled Act of 1982, Public Law 97–140.

practical means of measuring or a readily measurable surrogate for economic value, since no workable market exists for the sale of large quantities of embedded CPE. We sought comments addressing the relative merits of four different approaches to meeting this need:

(1) Imitating the process a firm would pursue in its capital budgeting process to estimate the economic value.

(2) Using net book value as a proxy for economic value.

(3) Relying on asset appraisal by independent appraisers.

(4) Conducting auctions.

*Id.*at 698–99. In addition, we solicited comments regarding the treatment under the Uniform System of Accounts of the transfer of embedded CPE out of regulated service. Related to that question is the problem of accounting for any gain or loss on the sale of embedded CPE in case later rate base adjustments become necessary due to the gain or loss. In addition, we requested comments with respect to methods by which carriers subject to our jurisdiction could account separately for revenues and costs associated with the provision of deregulated services and CPE.

C. *Comments by Interested Parties*

6. During the established pleading cycle which ended on July 9, 1982, parties filed comments and replies.[5] On August 24, 1982, however, the United States District Court for the District of

[5] Those filing comments included: Ad Hoc Telecommunications Users Committee (Ad Hoc); American Petroleum Institute; AT&T; California Public Utility Commission (California); Centel Corporation (Centel); Charles River Associates, Inc. (CRA); Citizens of the State of Florida; Computer and Business Equipment Manufacturers Association (CBEMA); Continental Telecom, Inc. (Continental); District of Columbia Public Service Commission; Federal Executive Agencies (FEA); Florida Public Service Commission (Florida); General Dynamics; General Telephone and Electronics (GTE); Independent Data Communications Manufacturers Association (IDCMA); Kansas Corporation Commission (Kansas); Michigan Public Service Commission Staff (Michigan); National Association of Regulatory Utility Commissioners (NARUC); North American Telephone Association (NATA); New York State Department of Public Service (New York); North Dakota Public Service Commission (North Dakota); Rochester Telephone Company (Rochester); Satellite Business Systems (SBS); SNET; Southern Pacific Communications Company (SPC); United States Independent Telephone Association (USITA); United Telephone System Inc. (United); Virginia State Corporation Commission (Virginia); and Wisconsin Public Service Commission (Wisconsin). CBI and U.S. Telephone & Telegraph Corporation indicated that they had no comment at this stage of the proceeding. Organizations filing reply comments included: Ad Hoc; AT&T; California; Centel; CBEMA; Continental; FEA; General Dynamics; GTE; IDCMA; NATA; Rural Telephone Coalition (RTC); SNET; SPC; and United. Summaries of these comments and replies appear in Appendix A.* CRA submitted a motion to accept late-filed comments and SPC submitted a motion to accept late-filed reply comments. These motions are hereby granted and the late-filed comments of SPC are also hereby accepted.

Columbia (hereinafter District Court) entered the MFJ in *United States v. AT&T.* The MFJ requires that the divested BOCs transfer all their embedded CPE, as well as the assets and personnel relied upon to provide its installation and maintenance, to AT&T not later than February 24, 1984.[6] In addition, the MFJ would permit the divested BOCs to enter the CPE market as retailers competing directly against their former AT&T affiliate, American Bell, Inc. (ABI). Responding to these new developments, AT&T filed Supplementary Comments in this proceeding on October 28, 1982, seeking the detariffing of all embedded CPE not later than January 1, 1984, the anticipated date of divestiture, and presenting a plan which called for a customer sales option for some embedded CPE, with the remaining embedded plant passing to ABI at adjusted net book value.[7]

7. We invited comment on AT&T's supplementary filing through a Public Notice issued November 2, 1982. Eighteen organizations filed comments on the AT&T proposal, and eight filed replies.[8] On March 29, 1983, AT&T filed Further Supplementary Comments containing additional proposals for the detariffing and transfer of Bell System embedded CPE by the time divestiture occurs. The new proposals represent an attempt to address many of the concerns raised in the last round of comments.

II. SUMMARY OF AT&T PROPOSAL

8. Both the comments responding to the *Notice of Inquiry* and those responding to AT&T's Supplementary Comments have focused upon certain issues relating to the detariffing options and methods of asset valuation presented in the *Notice of Inquiry* and developed by AT&T. To provide a framework for shaping our discussion of these issues, we shall begin with a summary of the AT&T proposal which

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[6] AT&T has recommended to the District Court that divestiture take place effective January 1, 1984. AT&T Plan of Reorganization at 5, United States v. AT&T (filed Dec. 16, 1982).

[7] AT&T defines adjusted net book value as original cost less reserve for depreciation, less deferred taxes, less unamortized investment tax credits, plus the deferred income tax on restored Western Electric profits. For a discussion of our concerns regarding this definition, see paras. 51–59, *infra.*

[8] Comments were filed by: Centel; CBEMA; California; FEA; California Hotel and Motel Association; GTE; IDCMA; International Communications Association (ICA); Kansas; Michigan; New York; NATA; RTC; SPC; United Technologies Communications Company (UTCC); United; USITA; and Utilities Telecommunications Council (UTC). Replies were filed by: AT&T; CBEMA; ICA; NARUC; SPC; UTCC, UTC; and Consumers Union of the United States, Inc. (Consumers Union). Summaries of these comments and replies appear in Appendix B*. New York submitted a motion to accept late-filed comments. This motion is hereby granted, and the late-filed comments of Consumers Union are also hereby accepted. The Supplementary Comments and Further Supplementary Comments submitted by AT&T are hereby accepted pursuant to Section 1.415(d) of the Commission's Rules, 47 C.F.R. § 1.415(d).

reflects how the plan has evolved in response to the concerns raised by parties' comments.

9. The AT&T proposal contained in its Supplementary Comments featured three essential components. First, embedded CPE would be transferred to ABI, AT&T's affiliate for offering unregulated products and services,[9] at adjusted net book value. Second, ABI would offer this CPE for sale or lease on a detariffed basis. The third facet of the AT&T proposal was a "price predictability program" for embedded CPE sales and leases. Under this program ABI would limit residential CPE[10] price increases to the percentage increase in the Consumer Price Index (CPI). For those customers who continue to lease single-line CPE, AT&T would set a maximum charge to limit increases and it stated that any upward adjustments toward this level would be at least nine months apart. To allow customers time to make a reasoned decision, AT&T proposed to announce the details of these price predictability plans within three months of release of an order by the Commission adopting its proposal and to file a supplement to its capitalization plan to cover the transferred CPE, with detariffing to begin in July 1983 and end by January 1, 1984.

10. Under this original proposal, ABI would have adopted an 18-month price freeze for business CPE. It would have continued to honor outstanding contractual arrangements for business CPE, with gradual price adjustments only for those non-contractual customers paying amounts different from the national level which the plan would establish for business CPE. It also promised maintenance support for all business CPE and prior notice of the phase-out of any product. For any embedded business equipment of a type also to be sold new by ABI, AT&T proposed a purchase option after this 18-month period.

11. In its Reply Comments, AT&T modified its original plan in certain respects. AT&T stated that lease prices set for all PBX, key, and single-line CPE would not exceed the highest tariff price

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[9] The Commission already has approved the capitalization of ABI to provide enhanced services, American Telephone & Telegraph Co., 90 FCC 2d 404 (1982), and new CPE, American Telephone & Telegraph Co., 91 FCC 2d 578 (1982). Presently pending before the Commission is a capitalization plan filed by AT&T on January 21, 1983, for the provision of embedded CPE. Action on this plan will be held in abeyance pending final action in this proceeding.

[10] AT&T's proposal uses three different terms to refer to embedded CPE which is to be offered for sale through its national sales program. While these terms, "single-line CPE," "residence CPE," and "consumer CPE," appear to be synonymous they do not correlate with the investment items list for Account 231, "Station Apparatus." In order to clarify the definition and the magnitude of the investment being offered for sale, we expect AT&T in its comments to apprise the Commission of the definition and dollar investment by product line for each of these terms, and the percentage of each to the total investment in Account 231. We also must be informed regarding the applicable amounts of related deferred taxes and investment tax credits by these product lines.

previously approved by a state commission. AT&T Reply Comments at 23. AT&T also stated that every effort would be made to provide as much notice as possible concerning product line phase-out, and expressed its intent to provide one-year advance notice for business systems whenever possible.

12. On March 29, 1983, AT&T submitted Further Supplementary Comments which modified and expanded its proposal. Major features of AT&T's modified proposal include:

(1) A $12 million nationwide advertising campaign, beginning in July 1983, to encourage residence customers to make an informed choice between purchasing embedded single-line CPE and continuing on a monthly charge basis.

(2) Continuation by ABI of the single-line sale plan after detariffing, with prices guaranteed not to exceed specified maxima for at least two years.

(3) Continuation by ABI for at least two years after detariffing of a monthly charge option at specified prices for embedded residence CPE.

(4) Purchase options covering a significantly broader range of embedded multiline CPE than had already been proposed, including the offering for sale, at the time of detariffing, of all embedded multiline CPE of a type also offered for sale new by ABI.

(5) Independent professional appraisal of supporting assets (*e.g.*, land and buildings)[11] to be transferred from BOCs to ABI.

13. The purchase prices for the most common residential CPE would be based on net book value, tax effects, and transaction costs[12] and at detariffing would be no higher than:

	Rotary	*Touch-Tone*
Standard (Desk and Wall)	$19.95	$41.95
Princess (Desk)	39.95	49.95
Trimline (Desk and Wall)	44.95	54.95

AT&T proposed that these maximum prices would remain in effect for at least two years after detariffing. Prices for refurbished sets may be higher than the prices for in-place equipment. It is not clear whether party-line equipment would be included in the sales program although it is our understanding that party-line equipment has been included in some of the state-tariffed sales programs currently in effect. It is our tentative view that the sale plan should include party-line equipment.

14. For those residential customers choosing to continue their current lease option, AT&T proposed a period of at least two years

[11] These supporting assets also will include all supporting assets transferred from a BOC rate base pursuant to ABI capitalization plan supplements submitted to the Commission on July 1, 1982, September 30, 1982, and January 21, 1983.

[12] The sales prices under AT&T's proposed sales program include transaction costs which vary significantly by product line. In its comments, AT&T should advise us of the method used to estimate these transaction costs by product line.

during which they may lease in-place residential phones at rates comparable to those they now pay. The proposed monthly charges to be imposed upon detariffing, under AT&T's proposal, are:

	Rotary	*Touch-Tone*
Standard (Desk and Wall)	$1.50	$2.85
Princess (Desk)	3.15	4.05
Trimline (Desk and Wall)	3.45	4.60

The national price for leasing a standard rotary phone would be fixed during the first two years of detariffing. Customers paying less than this rate for their rotary telephone would face rate increases during this period, but their monthly rate would not rise more than fifty cents above its current level in 1984. In jurisdictions in which the current lease rate for standard rotary phones exceeds $1.50, the plan would reduce the rate to $1.50. Increases in other lease charges would not be greater than the increase in the CPI during this period. In no case would ABI's charges during 1984 for in-place residential CPE be more than $1.00 higher than the rate currently in effect or filed in a given jurisdiction.

15. AT&T also expanded the details and scope of the multiline CPE sales program. AT&T identified embedded equipment which the Supplementary Comments already had committed ABI to offer for sale after the 18-month period following detariffing.[13] AT&T also represented that almost all types of equipment in ABI's current product line which also are in the embedded base (*e.g.*, Dimension PBXs and Horizon Communications Systems) would be made available for sale. Under the modified plan, the embedded CPE for all these types would be made available for purchase at detariffing. In its description of the expanded sales option for business CPE, AT&T indicated its intent to make most other embedded multiline CPE transferred to ABI available for sale, if feasible. This includes the sale of embedded cord boards (types 556 and 557) used by telephone answering services and alarm services as soon as detariffing occurs. AT&T also represented that, if feasible, almost all other embedded electromechanical CPE would be offered for purchase by January 1, 1986.[14] Criteria upon which AT&T would rely in determining whether to begin a sales program are:

[13] This equipment is as follows: certain telephone sets (500 and 2500 sets, multibutton electronic telephone sets); certain voice terminals (Com Key, Touch-A-Matic 32 automatic dialer, Speakerphone, Comm-Stor, Voice Paging); certain data communications equipment (Series 100, 200, and 300 modems, Dataphone II); certain data terminal equipment (Dataspeed 40, printers, 43 Teleprinter, Dataspeed 4540, 1000 Teleprinter); and teleconferencing equipment.

[14] Among the exceptions to this availability for purchase is 1A Key equipment. AT&T has indicated that it does not expect that this equipment "will . . . meet the criteria for a viable purchase option." AT&T Further Supplementary Comments at 13 n.*. In its comments regarding this Notice, AT&T should advise us of the reasons for its conclusions regarding 1A Key equipment.

(1) Evidence of sufficient customer interest to justify the cost of sales.[15]

(2) Assurance of a supply of parts.

(3) More timely depreciation to allow a price which recovers capital and is agreeable to customers.

(4) A means of informing customers about leased purchase option.

16. AT&T also proposed to hire independent professional appraisers to appraise supporting assets, such as land and buildings. See n.11, *supra*. This appraisal would be verified by a scientific sample by a second firm and meaningful differences would be subjected to a third appraisal with the average result being used. Assets never in the rate base and CPE in Account 231 or 234 would not be subject to this appraisal process. Costs of such appraisals would be included in Account 171, "Depreciation Reserve." AT&T, however, maintained that it would reserve the right to reconsider its proposal in light of such appraisal. AT&T Further Supplementary Comments at 18.

III. DISCUSSION

17. Our purpose in this proceeding is to devise a plan for the removal of embedded CPE from tariffed service. The accounting rules we promulgate will encompass the embedded base held by AT&T, the independent telephone companies,[16] the IRCs, and Western Union. In this part, we will discuss our tentative proposals and we will invite comments from interested parties regarding the adequacy of these proposals. We first present our views regarding the general options we intend to pursue in deregulating embedded CPE, based upon the options we outlined in the *Notice of Inquiry*. Next, we discuss the regulatory concerns and objectives guiding us in this proceeding, and the general criteria which we tentatively consider to be a necessary part of any detariffing and transfer plan sanctioned by this Commission. We then turn to a discussion of the issues with which parties have been most concerned with regard to AT&T's initial proposal, including consumer options before deregulation, detariffing, sale and lease pricing of the embedded plant after detariffing, mechanics of the ABI sale and lease procedures, antitrust issues, and asset valuation. Next, we address several account-

[15] AT&T identifies the following as the factors which would determine the cost of sale for any specific category of embedded CPE: handling of customer inquiries; performing physical inventories; developing procedures for sale of equipment shared by two or more customers; separating and tagging equipment; establishing a parts storage and distribution system to support maintenance; producing documentation; developing maintenance plan contracts and prices; and making modifications to bring equipment into compliance with applicable regulatory codes. AT&T Further Supplementary Comments at 13–15.

[16] For purposes of this proceeding, we include CBI and SNET among the independent telephone companies.

ing problems which must be resolved in this proceeding, including the treatment of embedded CPE sold under regulation and accounting procedures for the independent telephone companies. We also present for comment the issue of whether intrasystem wiring should be treated as part of the embedded CPE plant. We then present our tentative proposals regarding detariffing the independents' embedded base. Finally, we discuss our tentative proposals for detariffing the embedded CPE of the IRCs and Western Union.

A. *Tentative Selection of Options*

18. As we noted at para. 4, *supra*, the *Notice of Inquiry* sought comment regarding four proposed options for the removal of embedded CPE from regulated service. Based upon the objectives we have established in *Second Computer Inquiry* and in this proceeding, and upon our review of the comments submitted by interested parties in this proceeding, it is our tentative view that the most effective detariffing plan would combine the sale of embedded CPE in place[17] with the transfer of embedded CPE to the carrier's unregulated service, or, in the case of AT&T, transfer to ABI. In tentatively selecting these options, we recognize that the detariffing and transfer plans we adopt for the independent companies and the record carriers should be sufficiently flexible to accommodate their special circumstances. For a discussion of these circumstances, see paras. 71–79, *infra*.

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[17] AT&T has maintained that this Commission does not have authority under the Communications Act of 1934 to require the sale of CPE to subscribers or third parties and that, even if the Commission could claim such statutory authority, such a requirement would be an unconstitutional taking of property. AT&T Comments at 21–22, Appendix A. Several parties, in their reply comments on the Notice of Inquiry, disagreed with these contentions. *See, e.g.*, Ad Hoc Reply Comments at 21–28; CBEMA Reply Comments at 11–13, Appendix A; General Dynamics Reply Comments at 31–43; IDCMA Reply Comments at 8–17; SPC Reply Comments at 12–15. Although the fact that we are not here formulating a final plan requiring the sale of embedded CPE makes it unnecessary for us to resolve this issue at this juncture, we do observe that it is our view that the promulgation of a plan requiring carriers to provide subscribers with an option to purchase embedded equipment is well within our authority under the Act and does not *per se* raise any constitutional concerns.

In a similar vein, AT&T has noted that the elements of its proposed plan are "part of a broad program" and that AT&T's willingness to appraise supporting assets and to carry out its proposed sale and pricing policies "is contingent on Commission approval of the broad program." AT&T Further Supplementary Comments at 4–5. We note, however, that if we decide in this proceeding to impose requirements upon carriers relating to the appraisal of assets, the sale and pricing of equipment, or other matters, we have ample authority under the Act to structure these requirements in a manner which denies carriers any discretion regarding whether they must comply with these requirements.

1. *Advantages of Sale and Transfer Options*

19. We previously have expressed the view that the sale of embedded CPE under the auspices of the state commissions is a useful means of easing the transition to an unregulated CPE marketplace.[18] The continuation of state sales programs, together with the establishment of a sale option in this proceeding as part of a transfer plan, offers several advantages. First, the option to purchase embedded CPE increases the choices available to consumers. Second, it is our tentative view that making embedded CPE available for purchase is a sufficient mechanism for meeting our obligation to balance equitably the interests of ratepayers and carriers' investors in accordance with the tests established in *Democratic Central Committee v. Washington Metropolitan Area Transit Commission*, 485 F.2d 786 (D.C. Cir. 1973), *cert. denied sub nom.D. C. Transit System v. Democratic Central Committee*, 415 U.S. 935 (1974) (hereinafter *Demoncratic Central Committee*).[19]

20. Third, the sale of embedded CPE, combined with the detariffing of that portion of the embedded base which remains unsold, advances our efforts to achieve the deregulatory goals established in *Second Computer Inquiry*. A fundamental objective established in that proceeding is the promotion of a competitive CPE marketplace through the elimination of rate regulation. *See, e.g., Final Decision*, 77 FCC 2d at 441. In order to achieve this objective, it is our view that the detariffing of the unsold embedded base should not be unduly delayed. Finally, transferring all embedded CPE out of the rate base earlier rather than at a later time limits any potential increased risk that ratepayers would have to bear the burden of recouping carriers' investment in CPE which is removed from service (due to obsolescence or other reasons) before it is fully depreciated. This risk could continue to increase as competition grows in the CPE market because the alternatives generated by this competition could prompt a growing number of users to purchase or lease CPE from vendors other than the carriers presently providing them with their CPE. We also note that these options of sale and detariffing received considerable support in the comments which have been submitted in this proceeding.[20]

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[18] Further Reconsideration Order, 88 FCC 2d at 524 ("The sale of embedded CPE [under state tariffs] complements federal policy to the extent that such equipment is deregulated and the costs are removed from a carrier's rate base and jurisdictional separations process."); *see* Notice of Inquiry, 89 FCC 2d at 696.

[19] For a further discussion of our views regarding the application of Democratic Central Committee to the removal of embedded CPE from carriers' rate bases, see paras. 29–33, *infra*.

[20] Several parties, in their initial comments on the Notice of Inquiry, favored various permutations of the sale option. *See, e.g.*, Ad Hoc Comments at 19; California Comments at 4 (combined with detariffing embedded CPE which users do not desire to purchase or continue leasing); Continental Comments at 2 (in

2. *Disadvantages of Other Options*

21. The sale of embedded CPE to a third party poses several problems as a deregulatory vehicle. First, the sheer size of the embedded CPE base[21] makes it impractical to conclude that any buyer or combination of buyers could gather sufficient capital and support facilities and personnel to make such an option feasible. Second, opting for this approach would not obviate the need to address the difficult valuation issues which also come into play under Option 2.

22. Option 4, which involves retaining embedded CPE under tariff until it is fully retired, poses its own set of problems but, as we will discuss, certain considerations lend vitality to this option as a possible alternative which we do not intend to foreclose entirely at this stage of the proceeding. Turning to its disadvantages, however, we first must note that this option could force ratepayers to bear for a longer period of time the risk of costs associated with the loss of investment due to the retirement of CPE from service before it is fully depreciated. See para. 20, *supra*. Second, the continued tariffing of embedded CPE would impose other costs upon carriers, and these costs ultimately would be passed on to ratepayers. In this context, AT&T has argued that it would have to embark upon the costly undertaking of establishing a separate organization to provide tariffed, embedded CPE, and that it would have to prepare, file, and defend new embedded CPE tariffs in each state jurisdiction. AT&T Supplementary Comments at 9–10. Thus it might incur potentially avoidable costs as operations to support a dwindling stock of tariffed, embedded CPE are maintained.

23. Finally, continued tariffing until embedded CPE is retired, if

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combination with continued tariffing); General Dynamics Comments at 21 (in combination with state tariffs in effect for eight years); IDCMA Comments at 3 (coupled with continued tariffing and sale offers to third party); Kansas Comments at 2; Michigan Comments at 2 (combined with continued tariffing); NARUC Comments at 2 (under state auspices and combined with continued tariffing); North Dakota Comments at 2 (combined with continued tariffing).

Several parties, in their initial comments on the Notice of Inquiry, also supported various combinations of the sale and detariffing options. *See, e.g.*, API Comments at 3 (in combination with Options 3 and 4); Centel Comments at 4–5 (if valuation problems are resolved); CBEMA Comments at 12–15 (sale under state tariffs; transfer if valuation problems are solved); FEA Comments at 3 (if lessee elects not to continue leasing under tariff); Florida Comments at 2, 4 (sale and detariffing as state options); GTE Comments at 4–10 (for non-dominant carriers); New York Comments at 8–11; Rochester Comments at 7 (sale option up to divestiture of AT&T; transfer on date of divestiture); SPC Comments at 17, 20–21.

[21] The value of embedded CPE and related support assets in the rate bases of regulated carriers is estimated to exceed $20 billion. Notice of Inquiry, 89 FCC 2d at 695. We have noted that the value of assets held by AT&T in Account 231, "Station Apparatus," and Account 234, "Large PBXs," is approximately $14 billion. Further Reconsideration Order, 88 FCC 2d at 521.

considered as the exclusive option for effecting the transition to a deregulated CPE environment, cannot be viewed as a satisfactory, or even adequate, mechanism for achieving the objectives of *Second Computer Inquiry* and this proceeding. The promotion of competition in the CPE marketplace has long been a goal of this Commission. Although we do not intend to foreclose the use of this tariff option in certain circumstances which we will describe, we note that it is our tentative conclusion that the continuation of rate regulation, if treated as the only transitional device for disposing of the embedded CPE base, would deflect us from the path toward competition in the CPE marketplace. The restrictions and costs which this continued tariffing would impose upon carriers would seriously hamper their ability to become vigorous competitors in the CPE market.

24. It is important to note, however, that the continuation of tariff regulation may, in certain circumstances, have utility as a transitional mechanism if used in tandem with the sale option. This is true in the case of various deregulatory options we are considering for the independent companies and the record carriers, and it would be particularly true in the case of AT&T if only a small portion of the BOCs' embedded base is sold under state tariffs before our plan takes effect and a successful transfer plan is not developed under which a substantial majority of this embedded CPE is offered for sale under sufficient regulatory scrutiny so as to ensure that ratepayer interests are adequately protected. See para. 33, *infra*.

25. Our tentative preference is to permit the detariffing and transfer to ABI of that portion of the embedded base which is not actually sold, but we view this approach as contingent upon two factors. First, the portion of embedded CPE which is offered for sale under any transfer plan must be sufficient to meet our regulatory concerns and the requirements of *Democratic Central Committee*. Second, ultimate detariffing of the unsold embedded base depends in large measure upon our satisfactory resolution of a variety of problems which we will discuss subsequently in this *Notice*. These problems include valuation of the unsold base, accounting issues associated with detariffing, pricing under the sale option and the duration and terms of the sale option, leasing options available to current embedded CPE customers, and issues relating to customer proprietary information. This Commission can sanction a plan only if it meets these problems and concerns, and, in the case of AT&T, one purpose of this *Notice* is to solicit comments regarding the extent to which the plan proposed by AT&T already achieves this result. We recognize that, in the case of the independent telephone companies and the record carriers, our analysis of these problems may vary from the analysis applied in the case of AT&T, and it is our intention to include sufficient flexibility in fashioning plans for the independents and the record carriers. We also ask parties to comment regarding the appropriateness of our tentative view that

there may be circumstances under which continued tariffing would have to be invoked as the best means of promoting our objectives.

3. *Effect of Transfer of Embedded Base on Competition*

26. We discussed briefly at para. 3, *supra*, the issues set out in *Further Reconsideration Order* for resolution in this proceeding. The first two issues, regarding customer dislocations and valuation and accounting problems, are discussed subsequently in this *Notice*.[22] The third issue, regarding the effect upon competition of the transfer of AT&T's embedded CPE to ABI, warrants discussion here. In assessing this issue, two broad points should be made regarding the nature of competition in the CPE marketplace and the terms and conditions of the transfer to ABI which are proposed in AT&T's plan.

27. This Commission has strenuously sought to promote competition in the CPE marketplace,[23] and, in *Second Computer Inquiry*, we took notice of the fact that substantial progress had been made toward realizing the potential for competition in the various segments of the CPE market.[24] It is our continuing objective to encourage this development of competition, and we are cognizant of the fact that the transitional plan which we adopt in this proceeding may have a bearing upon the future course of this development.

28. The argument is made that an abrupt detariffing and transfer of AT&T's embedded base to ABI could have a stultifying

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[22] The need to protect ratepayers is discussed generally at paras. 29–32, *infra*. Issues relating to customer dislocations are also presented in connection with the discussion of pricing and consumer options under AT&T's proposed plan. See paras. 35–40, *infra*. Valuation issues are presented at paras. 30–32, 51–62, *infra*. Accounting problems are discussed at paras. 63–68, *infra*.

[23] *See, e.g.*, Second Computer Inquiry; Interstate and Foreign Message Telephone Service, Docket No. 19528, Second Report and Order, 58 FCC 2d 736 (1976), *aff'd sub nom.* North Carolina Utilities Comm'n v. FCC, 552 F.2d 1036 (4th Cir.), *cert. denied*, 434 U.S. 874 (1977); Interstate and Foreign Message Toll Telephone Service, Docket No. 19528, First Report and Order, 56 FCC 2d 593 (1975), *reconsideration*, 57 FCC 2d 1216, *further reconsideration*, 58 FCC 2d 716, *further reconsideration*, 59 FCC 2d 83 (1976); Telerent Leasing Corp., 45 FCC 2d 204 (1974), *aff'd sub nom.* North Carolina Utilities Comm'n v. FCC, 537 F.2d 787 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976); Carterfone, 13 FCC 2d 420, *reconsideration denied*, 14 FCC 2d 571 (1968).

[24] Final Decision, 77 FCC 2d at 439–40, 452. *See also* Majority Staff of Subcom. on Telecommunications, Consumer Protection, and Finance of House Comm. on Energy and Commerce, *Telecommunications in Transition: The Status of Competition in the Telecommunications Industry*, 97th Cong., 1st Sess. 184 (1981) (hereinafter House Staff Report) ("There has been a marked increase in the competitors' share of terminal equipment markets since the [FCC] registration program facilitated competition.") As a further indicator of growing competition, AT&T has pointed out that "[i]n early 1982, AT&T actually experienced a reduction of more than two residence telephones for each access line added. Data for business telephones show a pattern of consistent decline from a high of nearly three telephones added per access line in 1966 to a small loss in early 1982." AT&T Comments at 14.

effect upon competition, primarily because of AT&T's substantial share of the embedded equipment base.[25] Because of this concern, various parties suggest[26] that the transfer of embedded CPE to ABI must be "cushioned" in order to prevent adverse effects upon competition. AT&T responded to these concerns through the sale and lease options, and the price predictability periods, included in its latest proposal. It would appear, therefore, that AT&T is not proposing an abrupt transition to a deregulated environment. The provisions of its latest plan should work to prevent ABI from engaging in anticompetitive conduct in CPE markets in the wake of the transfer of embedded equipment. We invite parties to comment regarding whether these aspects of AT&T's plan are sufficient, or necessary, to satisfy concerns regarding the protection of competition. Ultimately, any detariffing plan must take these competitive factors into account.

B. *Regulatory Concerns and Objectives*

29. We will outline in this section what we believe are our regulatory obligations relating to the transition to the fully detariffed CPE environment. It is our tentative view that the case law regarding the issue of the treatment of capital gains and losses upon the removal of assets from regulated service, especially *Democratic Central Committee,* requires that we ensure that the carriers' investors receive their net investment in transferred or sold equipment at the time of transfer or sale, and that any gains or losses resulting from this transfer or sale accrue to the ratepayers. *Democratic Central Committee* requires that gains or losses on transfer or sale of assets must go to that entity, carriers' investors or ratepayers, which bore the risk of loss of capital value over the regulated life of the asset.[27] In this case, we tentatively find that our regulatory scheme which allows the carriers to file tariffs designed

[25] See House Staff Report at 186–87 for a description of this AT&T market share.

[26] See paras. 35–40, *infra,* for a discussion of various comments regarding requirements and safeguards which should be made to apply to the transfer of the BOCs' embedded CPE base to ABI.

[27] *See* Democratic Central Committee, 485 F.2d at 806–08. The Court of Appeals concluded that "an investor can hardly muster any equitable support for a claim to appreciation in asset value where he has been shielded against the risk of loss on this investment, or has already be rewarded for taking on that risk." *Id.* at 806. The Court of Appeals also noted a second principle which may be applied to balance investor and ratepayer interests in connection with the removal of assets from regulated service: "[H]e who bears the financial burden of particular utility activity should also reap the benefit resulting therefrom." *Id.* The Court applied this second test to dispose of the case before it because "there [had] never been any risk of financial loss, actual or foreseeable, on the parcels of land" at issue in the proceeding. *Id.* at 811. Our primary concern in this proceeding is with the first test set forth in Democratic Central Committee because the embedded CPE at issue here is subject to the types of capital loss risks (*e.g.*, casualty losses, retirement due to obsolescence) which the Court of Appeals elaborated. *Id.* at 807.

to earn the allowed rate of return and to recover reasonable depreciation expenses has placed the risk of loss on the ratepayers.[28] Therefore, the gains or losses resulting from any transfer should flow to the ratepayers rather than the investors. We invite interested parties to comment on our reading of the case law, our interpretation of the effects of our regulatory scheme, and the implications of these factors for our obligations.

30. Our initial view, expressed in the *Notice of Inquiry*, was that we would protect the ratepayers' interest by determining the value of the embedded CPE prior to its transfer or sale. This amount would be credited to regulated accounts at the time of transfer or sale, thereby satisfying the requirements of *Democratic Central Committee*. See *id.*, 85 F.2d at 811 & n.227. After reviewing the comments in response to the *Notice of Inquiry*, we now tentatively conclude that while our proposal to determine the amount the embedded CPE is actually worth to the carrier was conceptually sound, it would be extremely difficult as a practical matter to implement such an approach.[29] We pointed out in the *Notice of Inquiry* that for practical reasons we might rely on net book value as a proxy, and we tentatively conclude that this is the case. That is, it is our view that the only workable alternative for measuring the value of the embedded CPE is net book value.

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[28] The Commission, in fixing rates of return on carriers' interstate investment, has refused to add any additional premium to the rate of return as compensation for risks of loss associated with technological and market changes, finding that the carriers' investors are well protected against these risks. American Telephone & Telegraph Co, Docket No. 16258, Interim Decision and Order, FCC 67–776, 9 FCC 2d 30, 76 (1967). It has been the practice of the Commission to permit factors such as competition and obsolescence due to technological change to be taken into account in calculating depreciation expenses charged to ratepayers, and the Commission has noted that these depreciation calculations are designed so that "[t]here is very little danger that plant actually devoted to service will not be fully paid for." *Id.* at 77. For a description of the factors taken into account in determining depreciation expense, see American Telephone & Telegraph Co. (Charges for Interstate Service), Docket No. 19129, Phase II, Final Decision and Order, FCC 77–150, 64 FCC 2d 1, 63 n.84 (1977) (hereinafter Charges for Interstate Service). In that proceeding the Commission found that the calculation of depreciation expense ensures that "the ratepayers bear the risk of loss in value. Thus, when . . . a piece of property is retired and disposed of and a gain results, the equities of the situation would suggest that the ratepayer should receive the benefit of that gain." *Id.* at 67.

[29] We note that in United States v. AT&T the District Court considered establishing proceedings for determining the value of assets to be transferred as a result of the MFJ. The District Court noted the extreme complexity of such a proceeding and pointed to the protracted and contentious asset valuation proceedings in the Conrail case as exemplifying the problems which would be encountered in such a proceeding. The District Court settled on net book value as the appropriate standard after noting that Democratic Central Committee did not apply because the MFJ did not result in the removal of assets from regulated service. United States v. AT&T, 552 F.Supp. at 200–05.

31. Of course, such an approach to valuation does not definitely answer the basic question of what the equipment is actually worth to the entity acquiring it. Thus, a transfer at net book value would leave open the possibility that a gain might occur and accrue to the entity acquiring the embedded CPE rather than to the ratepayers. For example, if a telephone company were to transfer its embedded CPE to detariffed service after crediting regulated accounts with the net book value of the equipment, there would be no mechanism to guarantee that the carrier could not then sell the equipment for a great deal more than net book value, realizing a substantial capital gain. We feel that some mechanism to ensure against such an occurrence is required to meet our obligation under the *Democratic Central Committee* standard.

32. We believe that offering in-place CPE for sale at a price based on net book value plus reasonable transaction costs provides the needed mechanism to protect ratepayers. It is logical that the firm receiving the transferred equipment (*e.g.*, ABI, in the case of AT&T) cannot reap any capital gains which may be associated with the CPE after that CPE has been offered for sale at close to net book value. This is so because, if the CPE were worth a great deal more than net book value, presumably the subscribers would purchase it at the offered price.[30] On the other hand, if the CPE were not worth substantially more than net book value, then the equipment could not be sold by the transferee firm after the transfer at prices substantially in excess of net book value plus transaction costs. Thus, by combining the sale of in-place CPE to customers based on net book value plus transaction costs and the transfer of the unsold CPE to unregulated operations at net book value, ratepayers have the opportunity to receive the capital gains by purchasing the CPE and unregulated entities could not receive capital gains upon the transfer of unsold equipment. It is our view that the *Democratic Central Committee* standard can be met if all classes of CPE are offered for sale, in the aggregate, at net book value plus transaction costs. This approach ensures that ratepayers, as a class, would have an opportunity (through purchase of the embedded CPE) to realize any capital gain and thus prevent any gain from inuring to the benefit of investors. We conclude that *Democratic Central Committee* does not require that each and every piece of equipment be offered at net book value plus transaction costs. Further, it is our view that the complexities involved in such an approach would cause it to collapse of its own weight. It may be appropriate to apply the aggregated valuation approach suggested here on the basis of the different classes of CPE. The embedded CPE could be so divided and each class

[30] This conclusion, however, may also be dependent upon other factors which could affect customer response to the CPE purchase option, including the duration of the offer period and, in particular, whether the period is long enough to enable the customer to evaluate the offer and arrange for maintenance services.

could be valued, in the aggregate, at net book. Such an approach might be particularly necessary if any significant portions of the embedded base were not offered for sale to subscribers because the undervaluation of any such portion could result in a gain to the transferee entity rather than to the ratepayers. The balancing of equities which is at the center of the *Democratic Central Committee* test can be satisfied, in our view, if net book value plus transaction costs is imposed as an aggregated pricing requirement. We invite parties to comment on our conclusions regarding the *Democratic Central Committee* requirements and on the approach suggested here.

33. The failure to offer a significant portion of embedded CPE for sale while it is under tariff, or shortly after it is detariffed, at a price which gives ratepayers an opportunity to realize any gain in the value of the CPE would pose significant problems under *Democratic Central Committee.* Yet, it is possible that we might approve a transitional plan which does not involve the offer for sale of substantially all of the embedded CPE. In such a case, we would have to provide some mechanism other than the offer for sale at prices closely related to net book value for meeting our obligations to protect ratepayers from a disadvantageous transfer of those classes of equipment not offered for sale. There seem to be only two alternatives. First, we could elect to continue under tariff the kinds of embedded CPE which are not offered for sale. In this way, no transfer of this equipment would occur and ratepayers would suffer no loss of value of equipment devoted to tariffed service. Second, since the sale plan substitutes for the more difficult valuation of the CPE to be transferred, we could revert to the valuation approach. That is, in order to ensure that any gains accrue to the ratepayer, we could determine the value of the CPE not offered for sale and require the carrier to charge that amount to the entity to which the CPE is transferred. We seek comment from interested parties on these means for meeting our obligations to ratepayers in the event that only certain kinds of embedded CPE are offered for sale. We also seek suggestions as to any other means which might be available to meet our obligations in the event that some significant portion of AT&T's embedded CPE is not offered for sale.

34. In its Supplementary Comments, Reply Comments, and Further Supplementary Comments, AT&T has proposed a detariffing plan which includes the transfer of unsold CPE to ABI. We seek comment from interested parties on whether AT&T's plan is consistent with our obligations, concerns, and objectives, as discussed in this section. To the extent that parties believe AT&T's plan is not fully consistent with our goals we seek suggestions as to how it might be changed to bring it into conformance with our requirements. In the following sections, we focus attention on more specific issues regarding AT&T's proposal, on which we seek comment.

C. *Consumer Options before Detariffing*

35. California[31] asserts that no portion of the embedded base should be detariffed until customers have had an opportunity to purchase the CPE under tariff. Others, including CBEMA, FEA, IDCMA, Kansas, Michigan, SPC, and UTC, urge that embedded business CPE should be available for purchase under tariff before detariffing. We note that AT&T has stated that most single-line CPE customers either already have or will shortly have an opportunity to purchase embedded CPE while it is still under state tariff. AT&T Further Supplementary Comments at 7. In the *Notice of Inquiry* we encouraged the sale of embedded business CPE under state tariff before detariffing takes effect. *Notice of Inquiry*, 89 FCC 2d at 696. Although AT&T's proposal that detariffing occur by January 1, 1984, may make infeasible the implementation of such compulsory sale programs for business CPE in some states,[32] we invite parties to comment regarding whether the modified plan's treatment of business CPE makes the need for such tariffed sales less important than it otherwise might have been, and how it affects our responsibility to protect ratepayers consistent with the *Democratic Central Committee* standard.

D. *Pricing; Other Transitional Issues after Detariffing*

36. California, CBEMA, FEA, Michigan, and UTCC express fear that if the Commission fails to impose adequate price protections, then AT&T could follow anticompetitive pricing policies after detariffing. It is our tentative view that the revised AT&T proposal makes substantial progress toward allaying these understandable concerns. The revised proposal will offer price predictability and stability to both residential and business embedded CPE customers, whether they choose to buy or to continue leasing their embedded CPE. *See* AT&T Supplementary Comments at 16–17, 20–21. AT&T also suggests that the pricing framework which it has proposed significantly reduces opportunities for price manipulation by AT&T. We invite parties to comment regarding (1) whether the most recent revisions of AT&T's proposed plan adequately protect the interests of ratepayers and CPE users; and (2) whether additional pricing requirements are necessary to effectuate the goals set out in the *Notice of Inquiry* and in *Second Computer Inquiry* and to meet the regulatory objectives we have discussed in this *Notice*. California and CBEMA note that the initial AT&T proposal failed to establish any relationship between its sale and lease prices and the transfer costs

[31] References to comments in this section and sections D through F are to those comments and reply comments filed in response to AT&T's Supplementary Comments.

[32] *But see* California Comments at 6 (sales programs could be put in place expeditiously for multiline equipment).

of the embedded CPE from the BOCs to ABI. We invite parties to comment regarding whether the prices announced in the modified proposal are sufficient to alleviate fears that AT&T intends to establish sale and lease prices which deviate substantially from prices at which the embedded investment is transferred.

37. CBEMA complains that the initial plan did not require ABI to set a price for single-line CPE until after detariffing, while ICA makes the same observation concerning embedded business CPE. The modified plan announces specific prices for single-line CPE and caps lease rates for business CPE. The modified plan also would offer for sale at the time of detariffing all embedded business CPE of a type also offered for sale new by ABI at that time. It also responds to Kansas' assertion that all embedded business CPE should be offered for sale at the end of the price predictability period regardless of whether it is included among ABI's new equipment offerings. AT&T now indicates that it "intends to make most other embedded [Advanced Information Systems] CPE available for purchase . . . if feasible . . . ." AT&T Further Supplementary Comments at 12.

38. California finds a two-year price predictability period to be too brief,[33] and suggests a five-year period which would begin only after state approval of embedded CPE sales programs. California believes that states should also be authorized to review ABI's pricing after detariffing. Michigan would also prefer a price predictability period of four or five years. FEA would go even further and require AT&T to continue leasing embedded CPE under tariff until retirement. It is our tentative view that adopting any of these suggestions would perpetuate the restraints of a regulated environment. We invite parties to comment regarding whether the price predictability periods proposed by AT&T strike a fair balance between the legitimate business concerns of ABI and the need to extend suitable protection to customers and ratepayers, or whether additional requirements such as those proposed by California, Michigan, and FEA are necessary to ensure that the detariffing and transfer program is consistent with our goals in the *Notice of Inquiry* and in *Second Computer Inquiry* and with the objectives discussed in this *Notice*.

39. Three other transition issues raised in the comments warrant mention here. First, ICA asserts that the AT&T proposal is discriminatory because it provides a longer transition period for consumer CPE for business CPE. According to ICA, the 18-month transition period for business CPE is not long enough because "complex business CPE requires a substantially longer lead time for

[33] It is our understanding that, under the modified AT&T proposal, the price predictability period for single-line CPE is two years while the period for business CPE is 18 months. AT&T would endeavor to make "[a]lmost all categories of embedded electromechanical [business] CPE [available] for purchase by January 1, 1986." AT&T Further Supplementary Comments at 13 (footnote omitted).

customer planning and changes." ICA Comments at 6. It is our preliminary conclusion that this difference in treatment between consumer and business CPE does not have any deleterious effect on business users, but we invite parties to comment regarding whether a longer transition period is necessary to achieve the goals established in the *Notice of Inquiry* and in *Second Computer Inquiry*, and to meet the objectives discussed in this *Notice*. Second, CBEMA, IDCMA, and New York assert that no embedded CPE should be transferred to ABI before the anticipated date on which AT&T divests the BOCs in accordance with the MFJ.[34] With one exception, AT&T's modified proposal adopts their preference.[35]

40. Finally, California challenges the use of the CPI as a measure for increasing embedded CPE prices during the price predictability period. Under the modified plan, the CPI will have no effect upon the sale price of in-place single-line CPE, the lease charge for standard rotary sets (which comprise approximately 42 percent of in-place single-line sets), or the national prices for the lease of embedded business CPE. For setting prices for the remaining categories of embedded plant, *e.g.*, the lease of single-line CPE other than standard rotary sets, it is our tentative view that the CPI would not be an unreasonable surrogate to compensate for increases in the cost of doing business during the price predictability period. We find it unlikely that the CPI adjustments will result in unreasonable price increases over this period. Moreover, single-line customers who do not wish to continue leasing may avoid the CPI lease increases by purchasing their CPE from ABI or by purchasing from other vendors. We seek further comment regarding whether the CPI adjustments proposed by AT&T are consistent with our regulatory concerns and objectives.

E. *ABI Sale and Lease Procedures; BOC Support*

41. Several parties raise issues regarding the procedures which ABI will follow in connection with the sale and lease of embedded CPE after detariffing. ICA and UTC urge that ABI be required to give prior notice to embedded CPE users of any intention to discontinue products. AT&T now proposes to give advance notice whenever possible at least one year before the discontinuance of any business CPE offering. AT&T Reply Comments at 24. We invite comments regarding the adequacy of this approach. Two objections have been raised concerning the warranty program proposed by

[34] AT&T originally proposed that detariffing and transfer of embedded CPE begin by July 1983. AT&T Supplementary Comments at 22. For purposes of its proposal, AT&T has assumed a divestiture date of January 1, 1984. *Id.* at 3.

[35] The proposal does call for detariffing and transfer of embedded CPE "in at least one jurisdiction in 1983, so that American Bell operations and systems can be tested prior to January 1, 1984." AT&T Further Supplementary Comments at 19. See n.39, *infra*, for a further discussion of this proposal.

AT&T. California asserts that the warranty periods of 90 days for inventory purchases and 30 days for in-place purchases should be extended. We invite comments regarding whether it would be appropriate to impose warranty requirements which differ from those contained in the proposed plan, or whether the opportunity for customer choice and market forces are sufficient to protect the consumer. Kansas notes that the AT&T proposal limits the duration of implied warranties to the same length as express warranties,[36] and indicates that such a limitation on implied warranties would violate Kansas law. It would not be our intent to preempt either state statutes or Uniform Commercial Code provisions concerning implied warranties.

42. New York urges that ABI be prohibited from assessing an interest charge in connection with installment purchases of embedded CPE during the transition period. It is our preliminary view that AT&T's proposal[37] regarding interest assessments does not appear to constitute an extraordinary or objectionable business practice, but we invite the parties to comment regarding whether ABI should be authorized to assess interest charges and, if so, whether the rates should be specified in the rules we promulgate in this proceeding.

43. AT&T also proposes that the BOCs be permitted to furnish billing and other support services to ABI[38] after detariffing. California, Kansas, and IDCMA object, claiming that such BOC support operations may not be consistent with the MFJ and questioning "the appropriateness of having the regulated entity bill customers for detariffed equipment . . . ." Kansas Comments at 4. Although we do have concerns in this area regarding access to customer proprietary information, see paras. 45–49, *infra*, it should be noted that in conjunction with the detariffing and transfer of embedded CPE to ABI, approximately 64 million customer accounts must be converted. AT&T Reply Comments at 17. Substantial billing and other service disruptions could result if the BOCs were unable to provide billing and related support to ABI on a transitional basis in the absence of ABI's ability to provide these services for itself in a timely fashion. Even assuming that it is theoretically possible (which may be

[36] See AT&T Supplementary Comments, Appendix * A, at A-8.

[37] AT&T has indicated that installment purchases would "include interest charges on outstanding balances." The rate of interest is not specified. AT&T Supplementary Comments, Appendix * A, at A-10.

[38] The nature of these other support services is not elaborated in any detail in the AT&T filings. Presumably the services would include access to customer records and other records needed to support ABI's embedded base operations. AT&T's comments should provide clarification as to the nature of the BOC support services which would be provided to ABI. It also should be noted that, if we ultimately were to adopt a detariffing option involving bulk sales of the BOCs' embedded CPE to a third party, then it is our tentative view that the BOCs should be permitted to provide billing and other support services to the third party on an interim basis in a manner similar to the AT&T proposal.

questionable in itself) for ABI to have in place and properly functioning the necessary support systems, ABI could incur significant costs merely because it would be forced to construct on an expedited basis the billing and customer service systems needed as of January 1, 1984. It would appear to make little sense to invite the occurrence of these substantial service disruptions and costs when the available BOC support would ease the problems of transition for current BOC embedded CPE customers. If other regulatory concerns can be satisfied, it appears questionable whether transfer to ABI should be precluded based on its inability to provide customer billing services.

44. California, New York, and NATA assert that the BOCs should be fully compensated for any costs incurred in connection with support services they provide to ABI during the transition period. California and New York assert that the MFJ does not provide for any BOC support regarding embedded CPE after divestiture and that, therefore, such arrangements must be approved by the District Court in conjunction with its review of AT&T's Plan of Reorganization.[39] We invite comments regarding whether any plan we adopt should establish requirements relating to compensation. For instance, we recently have concluded that rate-of-return methods would not be used to constrain the amounts exchange carriers may earn by providing billing and collection services to interexchange carriers. *MTS and WATS Market Structure*, CC Docket No. 78–72, Phase I, Third Report Order, FCC 82–579, at para. 251 (released Feb. 28, 1983), *appeal docketed sub. nom.* NARUC v. FCC, No. 83–1225 (D.C. Cir., Mar. 1, 1983) (hereinafter *MTS and WATS Market Structure*). With regard to MFJ requirements applicable to BOC support for the provision of embedded CPE, it is for the District Court to examine whether BOC support may, consistent with the MFJ, be made available to AT&T after divestiture.[40] This

[39] IDCMA argues that AT&T must be granted a waiver from our Second Computer Inquiry requirements to enable the BOCs to furnish billing and other support services to ABI. At a minimum, these requirements would be applicable to the detariffing which may take place in 1983. See AT&T Further Supplementary Comments at 19. It is premature at this stage of this proceeding to reach any conclusions regarding whether we should deviate from our Second Computer Inquiry separation requirements prior to divestiture. We will address this issue as part of our disposition of this proceeding, but we note here that, as an alternative to the AT&T proposal, it might be possible for AT&T to simulate operations in a "detariffed and transferred mode" on a limited basis in 1983 as a means of easing the transitional problems it will face after divestiture. AT&T intends to follow a similar approach on a system-wide basis in the last quarter of 1983 in order to ensure uninterrupted service after divestiture. See AT&T, Plan of Reorganization at 468, United States v. AT&T (D.D.C., filed Dec. 16, 1982).

[40] A detailed AT&T proposal relating to the sharing of multifunction support facilities for embedded CPE is pending before the District Court. See AT&T, Plan of Reorganization at 89–109, United States v. AT&T (D.D.C., filed Dec. 16, 1982). AT&T argues that such sharing is necessary because "[t]he large volume and

need for judicial approval, however, does not forestall our review of the AT&T proposal regarding BOC support to ABI to determine whether it is consistent with the public interest standards which we are mandated to apply under the Communications Act of 1934. New York asserts that ABI should be required to reimburse the BOCs for the full cost of billing, including postage, handling, and paper costs, and that it may be necessary to include notice on customer bills that there is no connection between the BOC involved and ABI. AT&T has indicated that customer bills will include such a notice. AT&T, Response to Objections to Its Proposed Plan of Reorganization at 182, *United States v. AT&T* (D.D.C., filed Mar. 14, 1983). New York also would impose the costs of any such notice upon ABI. We invite the parties to comment regarding this proposal made by New York. We also ask parties to comment regarding whether the notice should include a statement that the customer may purchase CPE from other vendors.

45. An additional area of concern regarding AT&T's proposal for the provision of billing and other support services by the BOCs involves the question of access to BOC customer proprietary data. We recognized in *Second Computer Inquiry* that anticompetitive problems could result if the separated subsidiary had exclusive access to customer proprietary information maintained by an affiliated entity, and we required that such information "must be disclosed to other competitive vendors at the same time the subsidiary receives the information and under the same terms and conditions if it is shared with the subsidiary." *Final Decision*, 77 FCC 2d at 481.

46. AT&T, in its filings in *United States v. AT&T*, has argued that its access to BOC customer proprietary information will be severely restricted during the period AT&T is receiving support services from the BOCs in connection with embedded CPE. *See* AT&T, Response to Objections to Its Proposed Plan of Reorganization at 193–95, *United States v. AT&T* (D.D.C., filed Mar. 14, 1983). AT&T also has indicated that such proprietary information will be masked or rendered mechanically inaccessible to the extent that this is practical. "In situations where this is not practical, the contract [for support services] will require that such proprietary information .

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complexity of the BOC's records relating to embedded customer premises equipment render it operationally impossible for AT&T to attempt to duplicate all associated facilities and computer systems prior to divestiture." *Id.* at 90. AT&T has argued that the type of sharing it is proposing is permissible under the MFJ. AT&T, Response to Objections to Its Proposed Plan of Reorganization at 18, United States v. AT&T (D.D.C., filed Mar. 14, 1983). The Department of Justice has indicated to the District Court that it supports AT&T's proposal and does not find it to be inconsistent with the MFJ. Response of the United States to Public Comments and Action on AT&T's Proposed Plan of Reorganization at 96–102, United States v. AT&T (D.D.C., filed Mar. 24, 1983).

. . be held in confidence . . ." AT&T, Plan of Reorganization at 108–09; *United States v. AT&T* (D.D.C., filed Dec. 16, 1982).

47. The Department of Justice, in its filings in *United States v. AT&T*, has indicated that it is satisfied that "the sharing arrangements will not permit AT&T access to BOC marketing data or information on plans of subscribers to expand their service." Response of the United States to Public Comments and Action on AT&T's Proposed Plan of Reorganization at 98, *United States v. AT&T* (D.D.C., filed Mar. 24, 1983). The Department has concluded that there are sufficient safeguards in the proposed Plan to minimize the risk of anticompetitive conduct. *Id.* at 100. Several parties, however, in comments to the District Court regarding the proposed Plan, have argued that AT&T's access to BOC customer proprietary information will give it an unfair competitive advantage. *See, e.g.*, Initial Comments of the North American Telephone Association on the AT&T Plan of Reorganization at 48–49, *United States v. AT&T* (D.D.C., filed Feb. 14, 1983). The argument is made that the safeguards proposed in the Plan are insufficient, in part because "the fact that such [proprietary] data [which cannot be rendered inaccessible] would be held in confidence does not eliminate the substantial competitive advantage that the knowledge of such information brings with it to both the BOCs and to AT&T." *Id.* at 49 n.17.

48. Among the services AT&T proposes that the BOCs be permitted to provide to ABI is service order processing. BOC service order processing systems contain orders for changes or additions to access lines pending installation. Since customers with changing access line needs may also have changing equipment needs, this information could be of value to an equipment vendor. BOC billing information is contained in the BOCs' Customer Records Information Systems (CRIS). CRIS contains virtually all customer-specific information regarding CPE service provided by the BOCs to each of their customers. Access to customer service histories through a system such as CRIS could provide commercially useful information to an equipment vendor. If AT&T were to obtain such access, then ABI, unlike any other equipment vendor, would control information not only regarding the equipment it provides but also regarding the access line service to all BOC customers regardless of the identity of the particular equipment vendor involved.

49. Our concern in this area is to determine how any detariffing and transfer plan restrictions on ABI's access to BOC customer proprietary information which relies on BOC billing and other support services might affect our *Second Computer Inquiry* decisions. Under current procedures no customer-specific information may be disclosed by a BOC to ABI unless ABI obtains a written customer authorization for the release of such information after the customer has been informed that the customer may require the release of the

same information to any vendor of the customer's choosing. *See* Letter from Chief, Common Carrier Bureau, to Alfred A. Green, Attorney for AT&T (Nov. 24, 1982) (on file at Common Carrier Bureau). AT&T is required to maintain at central locations a list of customer-specific information which has been disclosed to ABI. If, under the transfer plan, ABI is able to access customer-specific information with respect to embedded CPE, the question arises as to whether other CPE vendors should have access to this information. We seek comment on this question and specifically whether any requirement for disclosure of customer-specific information to ABI should trigger automatic disclosure to competing vendors, or whether such disclosures should be at the customer's discretion. We also seek comment regarding whether we should view our concerns as being different from those which confront the District Court because we are faced with questions relating to the sharing of information between the BOCs and a deregulated entity (*i.e.*, ABI) which is not subject to price regulation, whereas the District Court is considering information sharing between the BOCs and a regulated entity (*i.e.*, AT&T) which would be offering the transferred embedded CPE under price regulation.

F. *Antitrust Issues*

50. NATA claims that the pricing mechanism proposed by AT&T could be a violation of the Federal antitrust laws, and IDCMA and NATA also assert that any rulemaking by the Commission which codifies the proposed pricing structure could amount to the extension of antitrust immunity for anticompetitive conduct. It is our view that it would not be productive for us to resolve these antitrust concerns at this stage of the proceeding, since we have not yet formulated the specific elements of the plan. We do, however, invite parties to submit further comments regarding this issue. These comments should address, in particular, whether the pricing elements of the AT&T proposal could lead to antitrust problems and, more generally, whether *any* requirement to sell embedded CPE to subscribers at net book value plus transaction costs, see para. 32, *supra*, raises antitrust concerns.

G. *Accounting Issues*

1. *Net Book Value*

51. We have already noted in this proceeding that net book value as a proxy for economic value "has the advantage of extreme simplicity, and it may be the most prudent approach in some cases given the practical difficulties of implementing other alternatives." *Notice of Inquiry*, 89 FCC 2d at 698. We still hold that view. See

paras. 30–32, *supra*. The definition of net book value is the cost of an asset less the related depreciation reserve. Under AT&T's proposal[41] embedded CPE would be transferred to ABI at adjusted net book value.[42] AT&T would adjust this net book value by deducting deferred income taxes and unamortized investment tax credits and adding amounts relating to Western Electric deferred taxes. We believe AT&T's adjustments relate to the determination of income taxes rather than the valuation of the assets. Therefore, it is our tentative view that the accounting treatment for deferred income taxes and investment tax credits relating to the transferred equipment should be determined as described below, separately from the valuation of the equipment.

2. *Deferred Taxes*

52. Deferred income taxes are income taxes charged to telephone company expense in past periods but not actually paid. As related to equipment, deferred income taxes generally result from different depreciation expense for regulatory accounting purposes than for tax purposes due to accelerated tax write-offs. Conceptually, deferred income taxes are the income taxes which would have been paid in past periods if accounting depreciation had been used for tax purposes. Thus, a company is able to avoid paying taxes in the earlier years of an asset's life cycle by charging more depreciation expense for tax purposes than for accounting purposes. It records tax expense in those years, however, based upon its accounting income. In later years when the company has less depreciation available for tax purposes its taxable income exceeds its accounting income. Thus, the differences in expense by year are merely timing differences. Taxes not paid in the past because of these timing differences must be paid in the future.

53. In effect, the taxes deferred because of timing differences represent cost-free capital to the company. For this reason the company's rate base is reduced by the balance of deferred taxes in computing rate of return and revenue requirements. Therefore, ratepayers benefit by paying a lower return element than would have been paid if accelerated depreciation had not been taken for tax purposes. It is because of this benefit to the ratepayer that the Commission has allowed "normalized" tax accounting under which income tax expense is charged based on book income rather than taxable income.

54. AT&T proposes to reduce the transfer price of embedded CPE by the amount of deferred taxes. It argues that the deferred taxes

[41] AT&T has proposed to appraise all supporting assets and transfer these assets at appraisal value. AT&T Further Supplementary Comments at 16–18. This specific modification is discussed at paras. 60–62, *infra*.

[42] See n.7, *supra*, for AT&T's definition of adjusted net book value.

should follow the asset because it will be liable for those taxes in future periods, after detariffing. We tentatively conclude that this is a reasonable treatment of the deferred taxes, with one exception. The deferred taxes have accumulated at the current tax rates. However, there is the possibility that at the time ABI sells this embedded equipment it may be subject to only a capital gain tax rate. Since the ordinary tax rate is considerably higher than capital gain rates, ratepayers would have paid a tax which is never incurred. We tentatively find that if AT&T is granted capital gains treatment of proceeds from the sale of this equipment, then the ratepayers should be compensated for this overpayment. We invite parties to comment on our analysis of the deferred tax issue.

3. *Investment Tax Credits*

55. AT&T proposes to reduce the net book value of assets transferred to ABI by the amount of unamortized investment tax credits related to the transferred assets. As previously noted, we tentatively believe that the accounting treatment for investment tax credits should be determined separately from the valuation of the assets because the credits are more closely related to the determination of the proper income tax expense than to asset value.

56. The investment tax credit provisions of the income tax law allow taxpayers to deduct a percentage of the cost of qualified assets as a direct offset to income taxes payable in the year the assets are purchased. Unamortized investment tax credits result when, for accounting purposes, these tax credits are not recorded as reductions in income tax expense when they are received but instead are deferred and amortized as reductions of income tax expense over the life of the assets that gave rise to them.

57. After reviewing this matter, we believe there are two possible accounting treatments for the unamortized investment tax credits. They could either be transferred to, and thus reduce, AT&T's investment in ABI which would have the same effect as AT&T's proposal to treat them as an adjustment to net book value; or they could be credited to income tax expense of the telephone companies when the assets are transferred to ABI. The first treatment would transfer the benefit of the unamortized credits to AT&T stockholders, and the second treatment would ensure that the carriers' expenses are reduced by the amount of these tax credits.

58. The argument in favor of the first treatment is that the investment tax credits were generated by the purchase of the assets and therefore the unamortized investment tax credits should follow those assets. This treatment draws support from the accounting which has been followed for investment tax credits, under which the credits have been deferred and amortized over the life of the related assets. It could be argued, therefore, that the unamortized credits

should be transferred with the assets for continued amortization over the life of the assets.

59. The argument in favor of the second treatment is that the assets were purchased and the credits realized under regulation and thus the credits should reduce the costs of regulated service when the assets are retired from regulated service. In this regard it should be noted that investment tax credits are different than deferred taxes in that there are no offsetting future taxes to be paid. Unless they are subject to recapture provisions for early retirement, the investment tax credits represent permanent tax reductions in the year they are deducted on the tax return. Moreover, if the assets were sold to a third party, the unamortized investment tax credits not subject to recapture would be credited immediately to income tax expense of the telephone company. Because investment tax credits are permanent tax reductions realized during the period of regulation, we tentatively believe that the unamortized investment tax credits should be credited to the income tax expense of the carrier when the assets are removed from the regulated accounts. We invite parties to comment regarding our analysis of this issue.

4. *Supporting Assets*

60. While AT&T adheres to the view that the proper valuation standard for the transfer of assets is adjusted net book value, it is willing to transfer supporting assets (all assets excluding CPE) at adjusted net book increased or decreased by appraisals. Apparently, AT&T's modification was offered in response to Commission questions about the possible appreciation of land and buildings which AT&T intends to transfer to ABI. In offering this modification AT&T reserved "the right to consider the results of the appraisals, and the precise nature of the effects of any action with respect to the transfer of supporting assets at a value other than adjusted net book value, before consenting to such transfer." AT&T Further Supplementary Comments at 18. Notwithstanding our overall concern with valuation, the transfer of land (and in this instance the transfer of buildings with associated land) raises a unique issue. In *Charges for Interstate Services*, Docket No. 19129, we took official notice that land is an appreciating asset, *id.* at 68 n.89, and concluded that the ratepayers should receive the benefit of gains resulting from such appreciation. It is specifically because of this conclusion that the question of possible appreciation on land and buildings was raised.[43]

61. In view of the fact that we are considering the transfer of land to ABI based upon independent appraisals, we must address the related accounting problem of recognition of gains in the sale of land.

[43] While appreciation on buildings *per se* is handled separately there is little doubt that on the whole the buildings to be transferred to ABI are worth more than the net book value.

Charges for Interstate Services, Docket No. 19129, recognized that our current rules do not provide for gains from the sale of land to accrue to the ratepayers. The current accounting rules relative to the sale of land call for gains or losses to flow to the stockholders. For the telephone carriers, the difference between the original cost and the sales price (less commissions and other expenses of making the sale) is credited to Account 360, "Extraordinary Income Credits" or Account 370, "Extraordinary Income Charges," as appropriate. Since this activity has been relatively insignificant in the past, we ordered in *Charges for Interstate Services*, Docket No. 19129, that appropriate accounting revisions to effect this policy be made at the time broad changes to the Uniform System of Accounts are made. Those broad changes are currently being developed in *Revision of the Uniform System of Accounts and Financial Reporting Requirements for Telephone Companies (Parts 31, 33, 42 and 43 of the FCC's Rules)*, CC Docket No. 78–196, Notice of Proposed Rulemaking, FCC 78–453, 70 FCC 2d 719 (1978), which will provide a complete revision of the Uniform System of Accounts. However, we do not anticipate final action in that proceeding until 1985. Because of the significance of the transfer of land in this proceeding, our rules must provide the accounting to recognize gains from its transfer if we adopt the appraisal method for the valuation of land. We therefore propose to revise our rules so that the gain resulting from the transfer of land to ABI will be reflected in Account 526, "Other Operating Revenues." Such an approach, in our view, is required to comply with the standard established in *Democratic Central Committee*, 485 F. 2d at 806, 808–18.[44]

62. Additionally, AT&T proposes to charge the cost of appraisals to Account 171, "Depreciation Reserve." However, the Uniform System of Accounts (Part 31 of the Commission's Rules) requires that these costs be charged to Account 675, "Other Expenses." Account 675 lists the "[c]ost of valuations, inventories, and appraisals of telephone plant . . . in compliance with orders of Federal, State, or other regulatory authorities" as appropriate charges to this account. Therefore, if the rules we promulgate in this proceeding order these appraisals, then it is our tentative view that the cost of the appraisals be charged to Account 675. It also is our tentative view, however, that it may be appropriate to require a division of these appraisal costs between the BOCs and ABI. We request parties to comment regarding this proposed treatment of these costs.

[44] In the case of any gains resulting from the increased value of land and buildings, and also in the case of any gains resulting from the sale of embedded CPE under regulation, see paras. 63–64, *infra*, it may be necessary, in order to satisfy the requirements of Democratic Central Committee, to establish a mechanism to ensure that the carriers' revenue requirements are offset by the amount of these gains so that the carriers' ratepayers would directly receive the benefit of the gains.

5. *Accounting for Proceeds of CPE Sold Under Regulation*

63. Under our current accounting rules the proceeds realized from the sale of embedded CPE are treated as gross salvage and thus are credited to the depreciation reserve. Similarly the transaction costs associated with the sale are treated as cost of removal and thus are charged to the depreciation reserve. In the past, these accounting procedures ensured that all gains and losses were ultimately passed on to the ratepayers over the remaining life of the assets remaining in each category of depreciable plant. However, these accounting rules could create problems in connection with the removal of embedded CPE from regulated service. Many BOCs and independent companies are now offering some embedded CPE for sale at state-tariffed rates. These rates may exceed net book value plus transaction costs, yielding capital gains on equipment sold. In applying our current accounting rules, these gains lower the net book value of the remaining CPE in the account.

64. Given the fact that only selected types and quantities of CPE are being offered for sale, we question whether this is the appropriate accounting treatment because any gains realized from sales would lower the net book value of the embedded CPE transferred to unregulated service, thus giving carriers' investors the benefit of the gains. Therefore, we are soliciting comments as to the appropriateness of the above approach. As an alternative to the above approach we solicit comments on the appropriateness of charging transaction costs to operating expenses and crediting the difference between the sales price and the net book value to revenues.

6. *Accounting Procedures for Independent Telephone Companies*

65. In our *Second Computer Inquiry* decision we did not place a separate subsidiary requirement on independent telephone carriers. Rather, we allowed these carriers the option of establishing a separate subsidiary or offering CPE and enhanced services through their existing corporation. If a carrier chooses to offer these services and equipment through its existing corporation it must use nonrate-making (below-the-line) accounts to account for these activities, even though we have not prescribed the final accounting requirements. Now that we are considering the transfer of embedded CPE, it is appropriate to establish the proper accounting and reporting for the investment, expenses, and revenues associated with all nontariffed operations. We are considering the establishment of accounting procedures for independent telephone companies similar to those proposed for record carriers in CC Docket No. 82–678.[45]

[45] Amendment of Part 34, Uniform System of Accounts for Radiotelegraph Carriers, and Part 35, Uniform System of Accounts for Wire-Telegraph and Ocean-Cable Carriers of the Commission's Rules and Regulations and Conforming Amendments to Annual Financial Reports Form O for Wire-Telegraph and Ocean-Cable

66. The Commission, in *Amendment of Parts 34 and 35*, CC Docket No. 82–678, proposes to establish rules under which nonregulated CPE activities are accounted for in separate books. The *Notice of Proposed Rulemaking* in that proceeding lists the following objectives: (1) assure availability for regulatory purposes of data which are not distorted by nonregulated activities; (2) establish specific accounts to identify account balances associated with nonregulated activities; (3) allow maximum latitude for carriers in establishing their accounting systems for nonregulated activities; (4) identify accounts affected by deregulation and establish instructions for transfers from prescribed accounts in Parts 34 and 35 of the Commission's Rules to the accounts for nonregulated activities; (5) provide for recording joint transactions and any necessary allocations between the regulated entity and its nonregulated activities; and (6) monitor the scope of nonregulated activities and any potential for adverse impacts on regulated services.

67. Under the Commission's proposal, carriers' accounting for nonregulated CPE activities would be revised by including all investment, revenues, and expenses for these activities in separate books of account. Only the net investment, and net income or loss, of nonregulated activities would be reflected, below the line, on the carrier's regulated books. The Commission proposal would eliminate Account 1610, "Miscellaneous Physical Property," Account 1615, "Allowance for Depreciation; Miscellaneous Physical Property," Account 5110, "Income from Miscellaneous Physical Property," and Account 5115, "Income from Merchandising, Jobbing, and Contracting." Investment, revenues, and expenses currently recorded in these accounts would be transferred to books for nonregulated activities. The Commission proposal also would add Account 1625, "Nonregulated Investments," and Account 5111, "Income from Nonregulated Investments," to account for nonregulated activities.

68. Interested parties are requested to comment on the applicability of the Commission's approach to the independent telephone companies, and to suggest the appropriate accounts, allocation procedures, and controls necessary to ensure that the below-the-line operation receives its full share of each company's costs. Parties may also suggest alternative approaches, including accounting which they consider more appropriate.

H. *Intrasystem Wiring*

69. The Commission, in *Modification to the Uniform System of Accounts*, CC Docket No. 82–681, Notice of Proposed Rulemaking, FCC 82–4265 47 Fed. Reg. 44770 (released Oct. 1, 1982), proposed to

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Carriers and Form R for Radiotelegraph Carriers with Respect to Accounting for Customer-Premises Equipment after Detariffing, CC Docket No. 82–678, Notice of Proposed Rulemaking, FCC 2d 82–423, 47 Fed. Reg. 44781, at para. 5 (released Oct. 1, 1982) (hereinafter Amendment of Parts 34 and 35).

detariff new intrasystem wiring associated with PBXs and key systems. Intrasystem wiring (also referred to as multiwiring or complex wiring) was defined as all cable or wire on the customer side of the demarcation point and its associated components (*e.g.*, connecting blocks, terminal boxes, conduit between buildings on the same customer's premises) which connects station components to one another or to the common equipment. The Commission also proposed to treat the embedded intrasystem wiring as an integral part of the valuation procedures to be developed in setting the value of embedded CPE in this proceeding. Thus, it was our tentative view that the embedded investment of the intrasystem wiring should be treated in the same manner as, and simultaneously with, its related embedded CPE. *Id.* at para. 23.

70. We now request parties to address the question as to whether it is desirable to include the intrasystem wiring as an integral part of the embedded CPE and thus account for it as "part and parcel" of the embedded CPE to be transferred. Various parties may perceive the transfer of embedded intrasystem wiring to ABI as having a detrimental effect upon the evolution of a competitive CPE environment, such that this wiring should not be transferred to ABI. We seek comment on this issue, including whether the advantages of detariffing embedded intrasystem wiring would be diminished if this wiring remained with the BOCs while the related embedded CPE is transferred to AT&T at divestiture. In addition, we seek comment on whether it would further our policies and objectives to require AT&T, before divestiture, to transfer ownership of embedded intrasystem wiring to ABI as part of any potential transfer of embedded CPE.[46]

[46] Although the MFJ orders the transfer of embedded CPE to AT&T, the District Court may require all inside wiring to remain with the BOCs. Such a requirement would conflict with our proposal of an intrasystem concept because intrasystem wiring is an element of inside wiring (approximately 25 percent to 30 percent). Several parties, in comments regarding AT&T's Plan of Reorganization in United States v. AT&T (D.D.C., filed Dec. 16, 1982), have argued that all inside wiring, including intrasystem wiring, should be transferred to AT&T. The Department of Justice supports AT&T's proposal in the Plan to allocate inside wiring to the BOCs. Response of the United States to Public Comments and Action on AT&T's Proposed Plan of Reorganization at 84–91, United States v. AT&T (D.D.C., filed Mar. 24, 1983). The District Court presumably will address this issue as part of its ruling on the proposed plan. The Department of Justice has made clear that the treatment of inside wiring in the MFJ is not intended to preclude the Commission from deregulating inside wiring and determining the manner in which the BOCs may engage in the offering of inside wiring after divestiture. Response of the United States to Public Comments on Proposed Modification of Final Judgment at 47 & n.*, United States v. AT&T (D.D.C., filed May 20, 1982). The Department also has indicated that the MFJ "is not intended to foreclose the FCC . . . from establishing mechanisms for the recovery of amounts in [Account 232, relating to inside wiring], including through charges to the users of [intrasystem] wiring." Response of the United States to Public Comments and Action on AT&T's

I. *Treatment of Independent Telephone Companies*

71. In fashioning appropriate rules and procedures for the detariffing of embedded CPE in a manner consistent with the objectives of our *Second Computer Inquiry* decision, we recognize that the MFJ raises issues which are uniquely applicable to AT&T. Because of this, it is our tentative view that the independent telephone companies need not be subject to the same timeframe for detariffing their embedded CPE as may govern AT&T. A reasonable period of time should be afforded for the detariffing of their embedded CPE. As to any of the options proposed in this section, it is our tentative conclusion that all embedded CPE provided by the independents should be detariffed not later than December 31, 1987.[47]

72. Various mechanisms are available to implement detariffing by this date. In general, this Commission could adopt any one of several approaches relying on various degrees of Federal scrutiny. One option could be to let states exercise their discretion as to the manner in which embedded CPE is to be deregulated within their respective jurisdictions. This approach would be subject to the general caveat that no state action is taken which is inconsistent with this Commission's general determinations in this proceeding, such as valuation requirements and mechanisms necessary to comply with *Democratic Central Committee*. States would be free to deregulate CPE on as rapid or gradual a basis as deemed appropriate under the circumstances, consistent with the requirement that all CPE be deregulated by December 31, 1987. This approach in large measure gives due consideration to the states' traditional role in the regulation of CPE. It also provides a means whereby states have sufficient flexibility to tailor detariffing plans of individual carriers so as to minimize any potential dislocations to consumers. Moreover, it appears administratively more expeditious to defer implementation to the various states as opposed to requiring Federal approval of detariffing plans of all carriers or mandating a uniform detariffing plan irrespective of the circumstances which may exist in particular localities. For these reasons we tentatively conclude that states

Proposed Plan of Reorganization at 88 n.*, United States v. AT&T (D.D.C., filed Mar. 24, 1983).

[47] This is the date on which the interstate revenue requirement associated with that plant will be reduced to zero. *See* Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket No. 80–286, Decision and Order, 89 FCC 2d 1 (1982), *appeal docketed sub nom.* MCI Telecommunications Corp. v. FCC, Nos. 82–1237 & 82–1456 (D.C. Cir. Mar. 4, 1982). In Amendment of Part 67, CC Docket No. 80–286, the Commission adopted the Popenoe Plan for defining the monthly interstate revenue requirement associated with embedded CPE during the five years ending on December 31, 1987. We anticipate that an individual company's requirement, as defined by that plan, would remain unchanged by that company's schedule for removing its embedded CPE from its rate base.

should have the flexibility to deregulate embedded CPE of the independents within the timeframe we are proposing.

73. A less preferred option would be for this Commission to set forth a detailed plan for the detariffing of all CPE on a nationwide basis. This does not appear necessary at this point when reasonable means are available to state regulators to effectuate the detariffing of CPE consistent with our *Second Computer Inquiry* decisions. It is necessary, however, to ensure that, if states do not take appropriate action to detariff embedded CPE by December 31, 1987, a Federal mechanism is in place to deregulate this equipment. Accordingly, we are proposing that if a state does not have a plan to detariff embedded CPE in effect as of July 1, 1985, this Commission would exercise its preemptive powers and issue guidelines under which all embedded CPE not covered by a state detariffing plan is deregulated.

74. Accordingly, we seek comment on this approach to the detariffing of embedded CPE provided by the independents. We also seek comment on the applicability of the accounting procedures we have set forth in this *Notice* to the independents, particularly insofar as they may relate to a state's efforts to deregulate embedded CPE.

J. *Treatment of IRCs and Western Union*

75. This proceeding also addresses the treatment of embedded CPE provided by the IRCs and Western Union. For Western Union, the embedded CPE involved includes Telex I equipment, TWX (Telex II) equipment, equipment used to provide satellite services, equipment used to provide private line services, and equipment used for Info-Comm services. For the IRCs, the embedded CPE involved includes all nontelex equipment. Embedded telex equipment offerings of the IRCs already have been detariffed by the Commission. *Interface of the International Telex Service with the Domestic Telex and TWX Service*, Docket No. 21005, 86 FCC 2d 411 (1981). With respect to the IRCs, we already have noted our intention to address these issues in this proceeding.[48]

76. We tentatively propose to treat the embedded CPE offered by the IRCs and Western Union in the following manner. First, all of the embedded base of the IRCs and Western Union must be detariffed not later than December 31, 1987. Second, the IRCs and Western Union must submit plans to this Commission, not later than June 30, 1984, which will be subject to approval by the Commission and which shall explain the detariffing principles and procedures which the applicant proposes to follow. These plans may incorporate proposals to detariff portions (or the entirety) of the embedded base before the December 31, 1987, deadline. The Commission, in reviewing these applications, will apply general guidelines intended to protect ratepayer and user interests while also giving the

[48] See Amendment of Parts 34 and 35, CC Docket No. 82–678, at para. 5.

companies sufficient flexibility to meet their own business needs in carrying out the detariffing process.

77. Third, the principles which we adopt in this proceeding in connection with the detariffing of embedded CPE by AT&T and the independent telephone carriers also will apply to the IRCs and Western Union.[49] Finally, the accounting procedures ultimately adopted in *Amendment of Parts 34 and 35*, CC Docket No. 82–678, to ensure that nonregulated activities are accounted for in separate books shall apply to the embedded CPE offerings of the IRCs and Western Union after detariffing. See para. 65, *supra*.

78. We seek comments from interested parties regarding two sets of questions. First, are the detariffing principles and procedures we are proposing for the IRCs and Western Union sufficient to balance equitably the interests of ratepayers, users, and the record carriers? To the extent that deficiencies are perceived in the proposed plan, what alternatives should be considered as a better means of meeting the objectives of *Second Computer Inquiry* and this proceeding?

79. Second, do we need to adopt special rules for the true-up of the value of embedded assets already removed from regulated service, or will it be appropriate to carry out this true-up process on the basis of the generally applicable rules which we adopt in this proceeding?

IV. CONCLUSION

80. Today we propose policies to govern the detariffing of embedded CPE held by the BOCs, the independent telephone companies, the IRCs, and Western Union. We have set out our general regulatory concerns and objectives and, in the case of the BOCs and AT&T, we have summarized the AT&T detariffing proposal, discussed the comments of parties regarding an initial version of the AT&T plan, and sought further comments addressing the modified version of this plan. For the independent companies, we have presented a set of options for detariffing their embedded CPE and we have invited comment regarding these options or alternative proposals. In the case of the IRCs and Western Union, we have posed a general set of questions regarding whether our proposals sufficiently balance the interests of ratepayers, users, and the carriers and whether the valuation rules developed in this proceeding should be applicable to any embedded CPE already detariffed by these carriers.

81. One of the fundamental goals of *Second Computer Inquiry* has been to carry forward the policies of this Commission regarding deregulation and the fostering of competition in the enhanced

[49] We already have indicated that a true-up procedure regarding the transfer value placed on embedded telex CPE already detariffed by the IRCs may be necessary as part of this proceeding. Amendment of Parts 34 and 35, CC Docket No. 82–678, at para. 19.

services and CPE marketplaces. In this proceeding we are seeking to effectuate this goal as it relates to the embedded CPE base of the Bell System, the independent telephone companies, and the record carriers. We have expressed our tentative view that a transitional plan which combines the offering for sale of embedded CPE with the detariffing of that portion of the embedded base which is not sold offers the most promise for a transition to a deregulated environment with the least amount of customer dislocations and administrative costs.

82. In the case of the Bell System, AT&T has placed before us a detariffing and transfer plan which generally comports with our views regarding the most effective means for carrying out the transition. We emphasize, however, two concerns regarding the AT&T proposal. First, our perception of the plan is that it represents a framework upon which we can construct a more complete structure for realizing our objectives. Our review of the comments in this proceeding indicates that the AT&T proposal does not address several issues which are of concern to various parties in this proceeding, and that a number of details remain to be worked out before we can be assured that a plan is fashioned which promotes our goals and objectives. The AT&T proposal, as we have noted in our discussion, has been modified to accommodate many of the concerns which have been raised, and it is our belief that further adjustments and modifications to the plan as a result of this proceeding may render the plan a suitable vehicle for carrying out the transition.

83. Second, our discussion has pointed out that several basic problems have to be resolved in order to accomplish detariffing in accordance with the schedule suggested in the AT&T proposal. At the center of these problems is the question of whether the portion of the embedded base which is offered for sale, and the rules under which the embedded base is valued for purposes of sale and transfer, will be sufficient to meet our regulatory objectives and the standards of *Democratic Central Committee*. Another set of problems involves the question of what provisions must be included in the plan regarding the terms and conditions of sales and leases by ABI in order to protect the interests of embedded CPE customers. Further, we must decide whether embedded intrasystem wiring should be treated as an element of the related embedded CPE for purposes of valuation and transfer. Finally, we must resolve several accounting issues, including the proper treatment of deferred taxes and investment tax credits.

84. We recognize that it would be facile to suggest that there are easy solutions to these problems, and we have sought to stress in this *Notice* that traditional utility regulation of carrier-provided CPE—as well as the way in which various consumers obtain and use their telephones—will be affected by the policies adopted by the Commission in this proceeding. It is our view, however, that the modified

AT&T proposal has made substantial contributions toward resolving these issues. Further, we have presented tentative proposals in this *Notice* which are designed to expedite the deregulation of embedded CPE without jeopardizing competition or ratepayer and customer interests. In addition, we must keep squarely in view the fact that competitive market forces are increasingly rendering price regulation of CPE impractical and unwarranted. This compels that deregulation of the embedded base occur sooner rather than later. We also must not lose sight of the fact that, because of the timetable of divestiture, there is the potential that AT&T (and, as a consequence, its ratepayers) may be forced to incur costs associated with maintaining the embedded base if detariffing and transfer to ABI are delayed. We consider it to be our responsibility to seek the avoidance of these costs if we can do so through devising a transitional plan which also promotes our procompetitive goals while minimizing dislocations and other costs. This *Notice* is a step in devising such a plan. We now seek the comments of interested parties as a further means of assisting us in this task.

85. In the case of the independent companies and the record carriers, we are able to view our objectives from a perspective which is not dominated by the impending divestiture of the Bell System. With regard to the independents, our primary concern is that detariffing be completed not later than December 31, 1987, the date on which the interstate revenue requirement for embedded CPE is reduced to zero. We also seek to ensure that the independents, working with state commissions, have sufficient latitude to establish detariffing plans which enable them to recover their investment in embedded CPE with minimum consumer dislocation. With regard to the record carriers, we also propose complete detariffing by the end of 1987 while granting the carriers flexibility in formulating their own plans, subject to our approval. Finally, we also are proposing that the accounting rules we adopt in this proceeding apply to the independents and the record carriers as well as to AT&T.

V. INITIAL REGULATORY FLEXIBILITY ANALYSIS

86. Interested parties are requested to comment upon the following initial regulatory flexibility analysis, which is included in this *Notice* in compliance with the requirements of the Regulatory Flexibility Act, 5 U.S.C. §§ 601–612.

A. *Reasons for Action; Objectives; Legal Basis*

87. This *Notice* proposes policies of general applicability designed to implement the policies established in *Second Computer Inquiry* with respect to embedded CPE owned by various common carriers. The primary objective of this proceeding is to adopt detariffing and transfer plans for embedded CPE which facilitate the establishment of a deregulated, competitive market for CPE, while

at the same time protecting ratepayer interests, minimizing user dislocations, and holding down administrative costs. The legal authority for this proposed rulemaking is contained in Sections 4(i), 4(j), and 201–205 of the Communications Act of 1934, 47 U.S.C. §§ 154(i), 154(j), 201–205.

B. *Applicability to Small Entities*

88. The provisions of this proposed rulemaking would apply to AT&T, ABI, the BOCs, the independent telephone companies, the IRCs, and Western Union. It is our tentative view that none of these companies falls within the definition of "small business" as that term is used in the Regulatory Flexibility Act. In the case of independent telephone companies, although we recognize that some of these carriers are small, we reiterate our conclusion in a recent proceeding that they are outside the narrow definition in that Act. *See MTS and WATS Market Structure*, CC Docket No. 78–72, Phase I, at para. 360 (local exchange carriers are excluded from definition of "small entity" because they are dominant monopolies in their fields of operation).

89. It also is our view, however, that the policy objectives of the Regulatory Flexibility Act are similar to those set out in Sections 2(b) and 203(a) of the Communications Act to 1934, 47 U.S.C. §§ 152(b), 203(a), the provisions of which are intended to relieve many small carriers from reporting requirements and other requirements established in the Act. Our intention in this proceeding, in proposing options for detariffing embedded CPE owned by independent telephone companies, is to minimize the transitional burdens imposed upon those companies. See paras. 71–73, *supra*, for a description of these options. We specifically invite the small independent companies, their trade associations, and others who may represent their interests to submit comments regarding these options and regarding other mechanisms which may meet our regulatory objectives in this proceeding while also minimizing reporting, recordkeeping, and compliance burdens upon the small independent carriers.

C. *Other Considerations*

90. We conclude that the proposed rules do not duplicate, overlap, or conflict with any existing Federal rules. It is our view that we are not required to examine significant alternatives to the proposed rules which would minimize significant economic impact upon small entities, because we have concluded that the proposed rules will not apply to small entities. As we have noted, however, we are considering several options regarding detariffing of embedded CPE owned by the independent companies, and our rulemaking will be guided, in part, by our intention to fashion a detariffing plan for the independents which minimizes any adverse economic impact upon them.

VI. COMMENT FILINGS AND ORDERING CLAUSES

91. We have presented proposals which we believe will enable carriers to complete the transition to full deregulation of the CPE market with minimal cost and inconvenience to carriers and subscribers. We seek comments discussing whether these proposals adequately address the issues discussed in this *Notice*. If interested persons believe that the proposals fail to address relevant concerns we ask that they suggest modifications which would make the detariffing and transfer plan responsive to those concerns.

92. For purposes of this non-restricted notice and comment rulemaking proceeding, members of the public are advised that *ex parte* contacts are permitted from the time the Commission adopts a notice of proposed rulemaking until the time a public notice is issued stating that a substantial disposition of the matter is to be considered in a forthcoming meeting or until a final order disposing of the matter is adopted by the Commission, whichever occurs earlier. In general, an *ex parte* presentation is any written or oral communication (other than formal oral arguments) between a person outside the Commission and a Commissioner or a member of the Commission's staff which addresses the merits of the proceeding.

93. Any person who submits a written *ex parte* presentation must serve a copy of that presentation on the Commission's Secretary for inclusion in the public file. Any person who makes an oral *ex parte* presentation addressing matters not fully covered in any previously-filed written comments for the proceeding must prepare a written summary of that presentation, and that written summary must be served on the Commission's Secretary for inclusion in the public file, with a copy to the Commission official receiving the oral presentation. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. *See generally* Section 1.1231 of the Commission's Rules, 47 C.F.R. § 1.1231.

94. ACCORDINGLY, IT IS HEREBY ORDERED, That, pursuant to Sections 4(i), 4(j), and 201–205 of the Communications Act of 1934, 47 U.S.C. §§ 154(i), 154(j), 201–205, and 5 U.S.C. § 553, NOTICE IS HEREBY GIVEN of the proposed adoption of new or modified rules, in accordance with the discussion and delineation of issues in this *Notice* and on the basis of previous notices and filings in this proceeding.

95. IT IS FURTHER ORDERED, That all interested persons MAY FILE comments on the issues and proposals discussed in this *Notice* not later than August 1, 1983 and that replies may be filed not later than August 22, 1983. In accordance with the provisions of Section 1.419 of the Commission's Rules, 47 C.F.R. § 1.419, an original and five copies of all statements, briefs, comments, or replies

shall be filed with the Federal Communications Commission, Washington, D.C. 20554, and all such filings will be available for public inspection in the Docket Reference Room at the Commission's Washington, D.C., offices. In reaching its decision, the Commission may consider information and ideas not contained in filings, provided that such information is reduced to writing and placed in the public file, and provided that the fact of the Commission's reliance on any such information or ideas is noted in the *Order*.

96. IT IS FURTHER ORDERED, That the Secretary shall cause this *Notice of Proposed Rulemaking* to be published in the Federal Register.

97. IT IS FURTHER ORDERED, That the Secretary shall transmit a copy of this *Notice* to the Counsel for Advocacy of the Small Business Administration in accordance with the Regulatory Flexibility Act.

98. IT IS FURTHER ORDERED, That the Secretary shall cause a copy of this *Notice* to be served on each state commission.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARIO, *Secretary*

* Appendix A and B-may be seen in the FCC Dockets Branch.

Control, Transfer of, Procedures
License, Assignment of, By Receiver in Bankruptcy
License, Assignment of, Involuntary
License, Assignment of, Procedures

Application for assignment of license granted. A violation of Section 310(d) of the Communications Act of 1934, as amended, requiring prior Commission consent to the transfer of control or assignment of a license, was not disqualifying where an application was promptly filed.
–D.H. Overmyer Telecasting Co. Inc.

FCC 83–224

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
D. H. OVERMYER TELECASTING CO., INC. Debtor in Possession - Bankruptcy Court S.D. New York (Assignor)	
and	File No. BALCT-810212KF
D. H. OVERMYER TELECASTING CO., INC. (Assignee)	
For the Involuntary Assignment of License of Station WDHO-TV, Toledo, Ohio.	
D. H. OVERMYER TELECASTING CO., INC. (Assignor)	
and	File No. BALCT-810212KG
D. H. OVERMYER TELECASTING CO., INC. Debtor in Possession - Bankruptcy Court N.D. Ohio E.D. (Assignee)	
For the Involuntary Assignment of License of Station WDHO-TV, Toledo, Ohio.	
FIRST NATIONAL BANK OF BOSTON	
For the Involuntary Transfer of Control of D. H. Overmyer Telecasting Co., Inc.,	File No. BTC-810330KE

Debtor in Possession - Bankruptcy Court
N.D. Ohio E.D., Licensee of Station
WDHO-TV, Toledo, Ohio.

MEMORANDUM OPINION AND ORDER

(Adopted: May 12, 1983 Released: May 20, 1983)

BY THE COMMISSION: COMMISSIONERS FOGARTY, JONES AND SHARP NOT PARTICIPATING.

1. The Commission has before it for consideration: (1) the above-captioned applications; (2) a petition for special relief and an informal objection to the application of the First National Bank of Boston, filed by The Overmyer Company, Inc.[1]; (3) opposition pleadings filed by the First National Bank of Boston; and (4) various related pleadings.

2. The Overmyer Company, Inc. (TOC) is the parent corporation of D. H. Overmyer Telecasting Co., Inc. (Telecasting), licensee of Station WDHO-TV, Channel 24, Toledo, Ohio. The circumstances leading to the present proceedings began in 1971 when the First National Bank of Boston (FNBB) made a loan to TOC for which the stock of Telecasting, the licensee, was pledged as collateral. In 1975, after notice of default, FNBB acquired ownership of 49% of Telecasting's stock and initiated receivership proceedings in Ohio to acquire ownership of the remaining shares. However, before the matter was resolved, the proceeding was stayed by the actions of TOC and Telecasting, each separately filing for Chapter XI bankruptcy protection in the United States Bankruptcy Court in the Southern District of New York.[2] Nonetheless, through the efforts of FNBB, Telecasting's bankruptcy proceeding in New York was eventually dismissed. However, on the same day of the dismissal, Telecasting initiated a new Chapter XI proceeding in the United States Bankruptcy Court of the Northern District of Ohio, Eastern Division.[3] In this second proceeding, FNBB continued to press its claims to the remainder of Telecasting's stock. On March 25, 1981,

[1] The Overmyer Company captioned the informal objection as a "Petition to Deny (Informal Objection)." However, since Section 309 of the Communications Act of 1934, as amended, does not provide for the filing of petitions to deny against involuntary transfer applications, the pleading will be treated as an informal objection under Section 73.3587 of the Commission's Rules.

[2] On November 11, 1976, the Commission granted an application (BALCT-603) for the involuntary assignment of the license which occurred when Telecasting entered bankruptcy proceedings. Essentially, the license went from Telecasting, as an independent entity, to Telecasting as a debtor in possession under the court's supervision.

[3] Two of the pending applications reflect the change of courts overseeing the Telecasting bankruptcy proceeding. When the New York court dismissed the first proceeding, an application (BALCT-810212KF) was submitted concerning the resulting involuntary assignment of the WDHO-TV license from Telecasting as a debtor in possession in New York to Telecasting as an independent entity. The

the court issued an order recognizing the bank's right to the remaining shares and directed that FNBB begin to oversee the licensee's operation, subject to the court's supervision. FNBB took control of Telecasting almost immediately and, on March 30, 1981, filed the application (BTC-810330KE) seeking Commission consent to the involuntary transfer of control of Telecasting pursuant to the bankruptcy court's order. Thereafter, TOC filed a petition for special relief with the Commission. seeking an order that FNBB relinquish control of Telecasting. TOC also filed an informal objection to FNBB's involuntary transfer application. These requests were opposed by FNBB. Action on the applications and pleadings were deferred pending a decision by the bankruptcy court in Ohio adjudicating all outstanding claims in the Telecasting bankruptcy proceeding. This decision was issued on September 17, 1982, and is currently on appeal. Between FNBB's assumption of control of the licensee and the September 17, 1982 decision of the bankruptcy court, a significant number of pleadings were filed with the Commission by both parties regarding FNBB's involuntary transfer of control application. Since some of the matters raised in these pleadings were rendered moot by the court's decision, the parties were requested by the Commission's staff to submit a summary of those matters still at issue. These summaries were filed on January 6, 1983, and the matters discussed below only address those issues raised or referred to in these documents.

Issues in Contest

3. TOC maintains that FNBB's assumption of control of Telecasting, without the prior consent of the Commission, violated Section 310(d) of the Communications Act of 1934, as amended. It states that FNBB acquired 100% of Telecasting's stock, designated new officers and directors for the licensee and has otherwise exercised *de facto* control over WDHO-TV's operation. Moreover, TOC contends that FNBB is not acting in a representative capacity for the court, such as a receiver, a bankruptcy trustee or even as a debtor in possession. TOC underscores this point by noting that FNBB is not a disinterested party, being one of Telecasting's largest creditors, and arguing further that the bank has a substantial beneficial interest in the Telecasting property. For these reasons, it also contends that the Commission's "short form" involuntary transfer of control procedure was not the proper procedure for FNBB to follow for its acquisition of control. In TOC's view, a substantial change in ownership occurred which required utilization of the Commission's "long form" procedure, especially since FNBB was allegedly acting in its own behalf,

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second application (BALCT-810212KG) reflects the involuntary assignment of the license to Telecasting as a debtor in possession under the bankruptcy court in Ohio.

and not for the protection of all creditors. TOC would thus distinguish the present case from other situations involving the court appointment of receivers or trustees. It would further distinguish this case from the appointment of a debtor in possession, since in such situations there is no real change in control. Consequently, TOC argues the present proceeding constitutes a sham, designed to avoid the procedural and substantive requirements of the Commission's "long form" application process.

4. TOC further maintains that FNBB was deliberately attempting to circumvent the Commission's jurisdiction by acquiring control through the bankruptcy court. It alleges FNBB knew that the Commission's prior consent was required for a change in control because of the bank's prior involvement in the communications industry and by the explicit terms of the stock pledge agreement by which Telecasting's shares were held as collateral. TOC further states that the bankruptcy court improperly impinged on the Commission's responsibilities. Citing *Radio Station WOW* v. *Johnson*, 326 U.S. 120 (1945), TOC argues that the Commission has exclusive jurisdiction over the disposition of licenses, which the bankruptcy court failed to observe in ordering the transfer of control. TOC avers that if the court's action is left unchallenged, a precedent will be established which will allow scores of similar court effectuated changes in control. While recognizing that under *La Rose* v. *FCC*, 494 F.2d 1145 (D.C. Cir. 1974), the Commission is under some duty to accommodate federal bankruptcy policy, TOC maintains that *La Rose* does not permit a bankruptcy court to order a change in control without the prior consent of the Commission. It thus argues that a decision such as *La Rose*, which urges reconciliation between the Communications Act and federal bankruptcy statutes, is irrelevant to FNBB's deliberate and illegal assumption of control. TOC argues that the present proceeding involves more than questions of local contract or debtor/creditor law, but concerns a violation of Section 310(d) of the Communications Act and whether the Commission or a bankruptcy judge will determine who controls broadcast facilities. TOC further maintains that FNBB's request for Commission consent subsequent to the change in control does not resolve the issues.

5. TOC also challenges the underlying basis of the court order which effectuated the transfer. It charges that the foreclosure on Telecasting's stock violated the Uniform Commercial Code. Further, that the bank's assumption of control without Commission consent not only violated the Communications Act, but also the terms of the pledge agreement. TOC additionally argues that the FNBB loan has been repaid through accounts receivable from TOC's other subsidiaries, which the bank has allegedly collected but misappropriated and converted. Citing *Granik* . v. *FCC*, 234 F.2d 682 (D.C. Cir. 1956), TOC argues that the alleged contract violation must be investigated by

the Commission, since any breach would reflect on the public interest and since a grant of the transfer might improperly influence the court. TOC further charges that it was not properly represented at the foreclosure hearing and that the Commission is under no obligation to enforce a court order based on a proceeding depriving a party of its due process rights. Moreover, it alleges that FNBB has refused to cooperate in attempts to arrive at a settlement which would benefit all creditors. TOC also argues that the bank took control while the bankruptcy court's order was still in the process of being appealed, frustrating TOC's ability to get meaningful relief. The unorthodox nature of FNBB's assumption of control, according to TOC, is underscored by the fact that the bank took control on March 25, 1981, and did not file an application for Commission consent until almost a week later, on March 31, 1981. TOC thus contends that the bank's transfer of control application should be designated for hearing. In the meantime, citing *Radio Corpus Christi*, 70 FCC 2d 1555 (1979), it argues that the Commission should issue a cease and desist order, requiring FNBB to relinquish control, and defer further action until all matters can be fully resolved. TOC also points out that the effectiveness of the bankruptcy court's order should be reviewed in light of the United States Supreme Court's decision in *Northern Pipeline Const.* v. *Marathon Pipe Line Co.*, 102 Sup. Ct. 2858 (1982), which found portions of federal bankruptcy law unconstitutional.

6. TOC additionally maintains that the present circumstances raise questions of whether FNBB has the basic qualifications to be a Commission licensee. TOC contends that the bank's submissions to the Commission contain serious misrepresentations. For example, it points out that FNBB represented in the 1971 loan agreements that Commission consent would be acquired prior to foreclosing on Telecasting's stock, yet the bank failed to do so. TOC also maintains that FNBB practiced deceit by failing to fulfill an offer of a settlement after TOC withdrew its appeal of a bankruptcy court decision. In addition, it contends that FNBB has improperly attempted to influence an applicant seeking a construction permit which would be mutually exclusive with an application for renewal of the WDHO-TV license.[4] Furthermore, TOC accuses FNBB of not keeping the Commission fully apprised of all relevant circumstances since the operation of the licensee is now under the control of the bank's nominee. Such an alleged change in control, it contends, also required the submission of a "long form" application and the Commission's prior consent. TOC also alleges that the bank has not

[4] FNBB has submitted an application seeking renewal of the WDHO-TV license. A separate license renewal application has also been filed by TOC which additionally challenges FNBB's license renewal application. These applications are mutually exclusive with other pending construction permit applications for WDHO-TV's frequency.

made a full disclosure regarding the citizenship and other business interests of its principals, information necessary to determine its qualifications. TOC additionally accuses FNBB of not fulfilling upon pledges to find a buyer for the station. Finally, TOC states that the bank delayed capital improvements in the facility, causing poor performance and a temporary loss of service. For all these reasons, TOC maintains that a substantial and material question of fact exists as to whether FNBB is qualified to operate the station.

7. FNBB opposes TOC's challenges to the bank's involuntary transfer of control application. FNBB argues that the matter should be treated as any normal involuntary transfer proceeding. It contends that the change in control took place as a matter of law, through the bankruptcy court's enforcement of the terms of the stock pledge agreement. It further argues that its application should be granted so as to avoid any appearance of a conflict between the Commission and the bankruptcy court. FNBB maintains that a grant would be consistent with the principles established in *La Rose* v. *FCC, supra*, which require administrative agencies to follow federal policies generally outside their areas of expertise, in order to assure their actions will serve the public interest. More specifically, it contends *La Rose* stands for the proposition that the Commission must accomodate the Bankruptcy Act in its decision, so as to protect the licensee's innocent creditors. It maintains that the Commission generally provides such accomodation by automatically authorizing an involuntary transfer of control upon a court's appointment of a receiver, trustee or debtor in possession. Moreover, it points out that TOC voluntarily submitted itself to the jurisdiction of the court when Telecasting was designated as a "debtor in possession" by that court. FNBB further argues that the court's order placing it in control was particularly important in the present case for three reasons. First, the court had found that TOC and other commonly owned companies were engaging in dishonest acts and attempting to defraud innocent creditors of Telecasting, which activities made it inappropriate that TOC remain in control. Second, under Ohio law, FNBB alleges it was entitled to acquire control under the stock pledge agreement because of the default on its loan. Third, it maintains that the court found the takeover of Telecasting to further the policies of the Bankruptcy Code by protecting the rights of the station's creditors, and that the public interest requires that such a policy be accommodated. The bank would also equate the positions of receiver, trustee and debtor in possession for the purposes of determining control under the Communications Act. Finally, FNBB contends that any further delay in granting the transfer would be harmful to the orderly administration of the Telecasting bankruptcy estate.

Discussion

8. At the outset, we note there is no objection to the grant of two

of the captioned applications (BALCT-810212KF and BALCT-810212KG). These uncontested involuntary assignment applications reflect the change of status of Telecasting from a debtor in possession under the New York Court to the same status under the Ohio Court. Consequently, they will be granted without further discussion so as to assure continuity with respect to the factual occurrences involved in this proceeding. As to TOC's challenge to FNBB's application for the involuntary transfer of control of Telecasting as a debtor in possession to the bank, the first issue presented is whether a grant of the application is warranted in view of alleged mistakes, illegalities and irregularities concerning the bankruptcy court's decision. The second concerns whether the Commission can find FNBB qualified to be a licensee based on the information before it. The remaining issues concern the appropriateness of filing a "short form" application rather than a "long form" and whether the bank violated the Communications Act by assuming control of the licensee without prior Commission consent.

9. As noted above, one objection of TOC to a grant of the bank's involuntary transfer application is on the grounds that the bankruptcy court made serious mistakes of fact and law in ordering the change in control of the licensee. Specifically, TOC claims that the underlying debt to FNBB was paid, making foreclosure on the pledged stock unnecessary; that it was not adequately represented at the bankruptcy hearing; and that the Supreme Court decision in *Northern Pipeline Const.* v. *Marathon Pipe Line Co., supra*, made the Bankruptcy Court's order ineffective. With respect to these arguments, we have consistently held that the Commission will not generally question the appointment of a bankruptcy trustee or receiver where a court is seeking to protect the creditors of a financially disabled licensee. *E.g., H. Edward Dillon, Receiver*, 42 FCC 2d 203 (1973). We have also held that private contractual disputes are more appropriately resolved by local courts of competent jurisdiction, because the Commission usually lacks the expertise, the resources and the jurisdiction to adjudicate such matters fully. *E.g., Carnegie Broadcasting Co.*, 5 FCC 2d 882 (1966). *See also Regents* v. *Carroll*, 338 U.S. 586 (1950). In the case cited by TOC, *Granik* v. *FCC*, 234 F.2d 682 (D.C. Cir. 1956), the court held that parties who had contractual claims to the ownership of a licensed facility possessed standing to file petitions to deny assignment of license applications. The present circumstances, however, do not revolve around a question of standing. Rather, they present a question of what forum can best resolve the issue of whether a bankruptcy court's order was appropriate. We find that such disputes should be left to those tribunals which are specifically charged with reviewing such matters on appeal. Moreover, TOC has not demonstrated that a grant of the bank's application will prejudice its pursuit of appellate relief. The facility will continue to

be under the supervision of the bankruptcy court, which, if instructed by a higher court, can order, subject to the prior consent of the Commission, that control of the facility return to TOC. For these reasons, further inquiry on these matters is not warranted.

10. A second matter raised by TOC concerns whether FNBB possesses the requisite qualifications to be a licensee. With regard to this matter, we note that the Commission's review of an applicant's qualifications in the context of an involuntary transfer application, filed pursuant to the order of a bankruptcy court, is ordinarily limited to the information called for by the "short form" application, FCC Form 316. Under such circumstances, as opposed to proceedings where a new, fully independent licensee is being reviewed, the Commission is only considering a party who will be operating the facility on a temporary basis; *i.e.*, only until the bankruptcy estate is settled and a new licensee can be approved by the Commission. *See Gulf Coast Radio, Inc.*, 45 FCC 1865, 1866 (1965). Moreover, where an entity acquires control in a proceeding such as this, it is doing so only under the supervision of a court. In the present case, FNBB has shown the requisite qualifications to acquire control of TOC in the context of an involuntary, "short form" proceeding. First, neither TOC nor our review of the proceedings has revealed any facts which would raise questions concerning FNBB's candor. We find that the bank's actions and representations only reflect a good faith effort to pursue or protect its interest in the WDHO-TV facility. Consequently, further inquiry into this matter is inappropriate.[5] We are also satisfied that FNBB meets the citizenship requirements imposed by the Act. First, FNBB has certified that it meets these requirements and TOC has failed to present any facts which dispute this representation.[6] Moreover, FNBB has indicated that the three people it has placed in charge of the licensee are U.S. citizens.[7] As a final matter, except for the issues surrounding the bank's alleged improper assumption of control, a matter which is discussed below, the only other facts alleged by TOC which might reflect on the bank's qualifications regard the charge that FNBB failed to make

[5] On May 26, 1982, attorneys for TOC filed a motion to strike portions of FNBB's pleadings and a motion to censure the bank's attorney under Section 1.24 of the Commission's Rules. TOC's attorneys were responding to allegations regarding the appropriateness of certain legal fees paid by Telecasting to them while TOC was still in control of the licensee. They believed the allegations were personally derogatory. Upon review of the FNBB pleadings, we do not find the allegations in question to be scurrilous or otherwise sufficient to warrant granting the TOC motions.

[6] This certification was contained in the pending renewal application for WDHO-TV which FNBB submitted on behalf of the licensee (BRCT-820601VM).

[7] Additionally, we find no merit to TOC's contention that an application should have been filed to transfer control from FNBB to its "nominees." It appears from the information before us that the "nominees" serve only as employees of the bank. Accordingly, no application was required to be filed.

necessary capital improvements in the WDHO-TV facility, which resulted in a temporary disruption of service. However, considering that the station was in the midst of a bankruptcy proceeding, any major expenditures could have been contrary to the interests of the station's creditors. Furthermore, even though the service was temporarily interrupted for one day, normal operations were quickly restored and TOC reports no further occurrence of such a loss of service. For these reasons, we do not find the incident raises a substantial question as to the bank's qualifications.[8]

11. The remaining TOC objections are that FNBB's use of a "short form" application, rather than a "long form," was inappropriate under the circumstances, and that FNBB violated Section 310(d) of the Communications Act by assuming control of the licensee before acquiring Commission consent. A "long form" transfer or assignment is appropriate where a new party will operate a station on a normal basis and we are thus required under the Act to allow a thirty-day period for public comment before determining whether the change in control would serve the public interest.[9] *See* Sections 310 and 308 of the Act. "Short form" approval, in contrast, does not require a thirty-day waiting period and is used only where control is changed as a result of an involuntary court proceeding; the death of a principal; or where there is not a substantial change in ownership. *See* Section 309 of the Act; and Sections 73.3540 and 73.3541 of the Rules. Although TOC argues otherwise, the present circumstances involve an involuntary transfer necessitating the filing of only a "short form" application. FNBB took control upon the order of the bankruptcy court; it will only remain in control until a regular licensee is approved; and, while it holds control, it will be under the court's supervision. Furthermore, for purposes of the Communications Act, we find it inappropriate to accept TOC's proposition that distinctions should be made between court appointed agents, such as FNBB, and debtors in possession, trustees and receivers. While each designation has its own significance under federal bankruptcy law, they all represent essentially the same basic situation with regard to the control of a licensee; *i.e.*, in each case a licensee is not an independent entity, but subject to the control of a court appointed and supervised officer. Thus, when such an appointment is made or when the person holding the appointment is changed, involuntary, "short form" procedures apply.

12. We turn now to FNBB's alleged premature assumption of

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[8] It appears that TOC also questions FNBB's qualifications under our multiple ownership rules. However, the rules are not applied to involuntary, "short form," transfer situations. See Section 73.636 of the Commission's Rules, Note 8.

[9] A "transfer of control" takes place where a new party acquires control of a corporate licensee through the purchase of a controlling stock interest in the licensee. An assignment takes place where there is a purchase of the station's assets and the license is assigned to the purchaser who then becomes the licensee.

control. Section 73.3541 of the Rules provides that in the event of the "legal disability" of a licensee, *e.g.*, the appointment of a bankruptcy trustee or receiver, an application on FCC Form 316 (the "short form") will be filed requesting Commission consent to the involuntary transfer or assignment of the subject broadcast license. In the present case, such an application was filed within five days of the court's order placing FNBB in control. Thus, the bank acted promptly in filing its application under the requirements of the rule. What has prevented our prompt disposition of the application in this case has been the unusual maneuverings by FNBB and the Overmyer interests as to the proper court, and the filing of numerous pleadings contesting the involuntary transfer. The time needed to process those pleadings, however, is not a matter that reflects adversely on FNBB. We also note that the court ultimately found that TOC and other co-owned companies were engaged in numerous fraudulent arrangements, whereby funds owned by Telecasting to various creditors were being usurped for the benefit of a TOC principal, Daniel H. Overmyer. In fact, it appears from the court's decision, that these practices may have taken place until FNBB assumed control of the licensee in 1981. To quote from the court's opinion, "This Court has heard evidence of and witnessed fraudulent and deceitful manipulation of facts, corporate fictions and the court system. This Court has never encountered such a systematic distortion of truth and the legal system." *In re D. H. Overmyer Telecasting Co., Inc.*, 23 B.R. 823, 917 (Bktcy. N.D. Ohio E.D. 1982). It ultimately found that, based on misconduct between 1975 and 1981, Overmyer and his various companies were liable for an amount in excess of $3,400,000, representing funds fraudulently conveyed from the licensee. 23 B.R. at 932–33.[10]

13. In *La Rose* v. *FCC*, 494 F.2d 1145 (D.C. Cir. 1974), the U.S. Court of Appeals for the District of Columbia Circuit reversed a Commission order which denied the license renewal application of a broadcast station operating under the control of a bankruptcy receiver. One point emphasized by the court was the need for the Commission to reconcile its policies under the Communications Act with those of other federal laws and statutes. 494 F.2d at 1146, note 2. Moreover, this same need for reconciliation is emphasized by the U.S. Supreme Court in *Radio Station WOW* v. *Johnson*, 326 U.S. 120, 132 (1945). In the present case, we are faced with a conflict between the efforts of a federal bankruptcy court to protect the interests of defrauded creditors and the enforcement of the prior consent requirements of Section 310(d) of the Act. Given this need for reconciliation and the extraordinary circumstances faced by FNBB,

[10] The Court also found that all dealings between the licensee and either members of Overmyer's family or his companies since 1973 involved conduct defrauding FNBB.

we do not find the bank disqualified as a temporary operator of Station WDHO-TV because it took control of the station prior to receiving the consent of the Commission.[11]

Conclusion

14. Accordingly, we find that TOC has failed to raise a substantial and material question of fact that a grant of the subject involuntary transfer application would not serve the public interest. Specifically, TOC has failed to raise any question that FNBB does not have the requisite qualifications to be a Commission licensee under an involuntary transfer proceeding. Moreover, we find that a grant of the application, under the circumstances, would, in fact, serve the public interest, convenience and necessity.[12]

15. Accordingly, IT IS ORDERED, That the application (BALCT-810212KF) seeking Commission approval for the assignment of the license of Station WDHO-TV from D. H. Overmyer Telecasting Co., Inc., debtor in possession under the United States Bankruptcy Court, Southern District of New York to D. H. Overmyer Telecasting Co., Inc., IS GRANTED.

16. IT IS FURTHER ORDERED, That the application (BALCT-810212KG) seeking Commission approval for the assignment of the license of Station WDHO-TV from D. H. Overmyer Telecasting Co., Inc., to D. H. Overmyer Telecasting Co., Inc., debtor in possession

[11] In so holding, we wish to emphasize that, as a general position, a receiver or trustee should await a grant of its application before assuming control of the station involved. Only the highly unusual circumstances of the present case warrant such a departure. We specifically reject FNBB's contention that it could assume control as a matter of law, through the court's enforcement of a stock pledge agreement.

[12] Daniel H. Overmyer was the controlling stockholder of TOC when most of the activities found to be fraudulent by the bankruptcy court took place. On January 29, 1979, an application (BTCTV-790129LC) was filed seeking Commission consent to the transfer of control of TOC, from Overmyer to Clark Television, Inc. The transferee was wholly owned by the Clark Trust of which Shirley C. Overmyer, the wife of Daniel H. Overmyer, was settlor and trustee, and of which their children were the beneficiaries. FNBB, who had not yet assumed control of the licensee, filed an informal objection to the transfer application alleging that the change in control was part of a course of action designed to evade or frustrate the legitimate claims of creditors. Nevertheless, in a letter dated February 19, 1981, from the Chief of the Broadcast Bureau's Renewal and Transfer Division to FNBB's attorney, the Commission denied the bank's objection and granted the transfer. The letter found that FNBB had failed to show how a grant of the transfer would prejudice the claims of creditors and stated further that the most appropriate means of pursuing such claims would be through a local court of competent jurisdiction. On March 18, 1981, FNBB filed a petition to stay the consummation of the transfer and a petition for reconsideration of the Commission order. As noted previously, a week later, on March 25, 1981, FNBB was ordered to assume control of the licensee by the bankruptcy court. Nonetheless, FNBB's petitions for stay and reconsideration are still pending. However, in light of the court's action and our own determinations in the current proceeding, we find FNBB's petitions are moot.

under the United States Bankruptcy Court, Northern District of Ohio, Eastern Division, IS GRANTED.

17. IT IS FURTHER ORDERED, That the petition for special relief filed by The Overmyer Company, IS DENIED.

18. IT IS FURTHER ORDERED, That the motion to strike and the motion to censure filed by The Overmyer Company, IS DENIED.

19. IT IS FURTHER ORDERED, That the informal objection of The Overmyer Company to the application for the involuntary transfer of control of D. H. Overmyer Telecasting Co., Inc., debtor in possession under the United States Bankruptcy Court, Northern District of Ohio, Eastern Division, from The Overmyer Company to the First National Bank of Boston, IS DENIED.

20. IT IS FURTHER ORDERED, That the application (BTC-810330KE) for the involuntary transfer of control of D. H. Overmyer Telecasting Co., Inc., debtor in possession under the United States Bankruptcy Court, Northern District of Ohio, Eastern Division, from The Overmyer Company to First National Bank of Boston, IS GRANTED.

21. IT IS FURTHER ORDERED, That the Mass Media Bureau shall send, by Certified Mail, Return Receipt Requested, a copy of this Memorandum Opinion and Order to each of the parties named herein.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Satellite Domestic Communications
Satellite Launch Authority
Satellite Orbit

Commission assigns orbital locations for new and previously authorized domestic fixed satellites, modifying previous 1980 plan, 84 FCC 2d 584 (1981). Action results from reduced orbital spacing criteria in the 4;6 GHz and 12;14 GHz bands adopted concurrently in *Report and Order* in CC Docket No. 81–704.
–Domestic Fixed-Satellite Service

FCC 83–186

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of

Assignment of Orbital Locations to Space Stations in the Domestic Fixed-Satellite Service.

MEMORANDUM OPINION AND ORDER

(Adopted: April 27, 1983 Released: August 12, 1983)

BY THE COMMISSION: COMMISSIONER JONES ABSENT

1. By separate orders[1], we are today authorizing the construction of 19 additional domestic fixed satellites and the launch of 19 new or previously constructed satellites. These newly authorized in-orbit satellites will constitute a substantial increase by 1987 in the domestic satellite capacity that will be available to users. To accommodate this growth, we are adopting reduced orbital spacing criteria in both the 4;6 and 12;14 GHz bands in today's *Report and Order*.[2] The purpose of this order is to assign an orbital location for each of the currently authorized domestic satellites.[3]

[1] Advanced Business Communications, Inc., FCC 83–187; American Telephone and Telegraph Company, FCC 83–188; American Satellite Company, FCC 83–189; Hughes Communications, Inc., FCC 83–190; Rainbow Satellite, Inc., FCC 83–191; RCA American Communications, Inc., FCC 83–192; Satellite Business Systems, FCC 83–193; Southern Pacific Communications Company, FCC 83–194; United States Satellite Systems, Inc., FCC 83–195; and Western Union Telegraph Company, FCC 83–196; all adopted today.

[2] "In the Matter of Licensing of Space Stations in the Domestic Fixed Satellite Service", *Report and Order* in CC Docket No. 81–704, FCC-83–184, adopted today.

[3] We also identify in the Appendix several unassigned orbital locations. They will be available for the next group of space station applications to be processed. *See*

Background

2. In our *1980 Orbit Assignment Order*[4], we adopted a tentative plan of orbital location assignments intended to govern the launch of new domestic satellites until about 1983. We then began the proceedings in CC Docket No. 81–704 to evaluate the feasibility of reducing orbital separations to 2 ° in both the 4;6 GHz and the 12;14 GHz bands to satisfy additional service requirements.[5] In our *Report and Order*, we conclude that an average spacing of about 2.5 ° at 4;6 GHz, and a uniform spacing of 2 ° at 12;14 GHz, are immediately feasible. Such orbital spacings are also needed to accommodate all of the domestic satellites proposed in the current group of applications being processed.[6]

3. Because there are only three United States domestic satellites presently in orbit at 12;14 GHz, we will assign orbital locations at uniform 2 ° intervals at this time. However, at 4;6 GHz, there are presently a dozen operational satellites with thousands of licensed earth stations in service. Satisfactory operations with 2 ° satellite spacings are likely to require the upgrading or replacement of many of these existing antennas. We wish to delay as long as possible such impacts on current users and maximize the opportunities for full equipment amortization. Thus, orbital separations between 2.5 ° and 3 ° are to be provided between many domestic satellites during the next couple of years. However, new earth station equipment compatible with 2 ° orbital separations should be readily available within the next year or so. Thus, 2 ° separations can be implemented between new satellite networks established at 4;6 GHz within the next few years.

4. Our *1980 Orbit Assignment Order* summarized the policies and procedures we apply in assigning orbital locations to domestic satellites, and we have restated and clarified them in today's *Report and Order*. We have consistently held that the desires of an applicant for a particular orbital location do not limit our flexibility to assign orbital locations that best serve the public interest.[7] Any variations in the characteristics of different orbital locations in the same

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Memorandum Opinion and Order, FCC 83–185, adopted today. Additional orbital locations are also available for new domestic satellites, and we may pursue further reductions in orbital spacings in the course of processing those applications to accommodate more satellites in orbit.

[4] Orbit Deployment Plan-Domestic Satellite, 84 FCC 2d 584 (1981).

[5] *See* Domestic Fixed-Satellite Service, 88 FCC 2d 318 (1981).

[6] We also decided that a 2 ° orbital spacing criterion at 4;6 GHz is the appropriate long-term objective if continued growth and new entry is to be maintained in the domestic satellite industry. These reductions in orbital spacings also demonstrate the feasibility of accommodating an increasing number of domestic satellites operated both by the United States and by other countries through the current international frequency coordination procedures.

[7] *1980 Orbit Assignment Order, supra* note 4, at 601. *See also Report and Order, supra* note 2.

portion of the geostationary arc do not appear to be comparatively significant; nor do requests by different applicants for the same orbital location give rise to comparative hearing rights.[8] In general, we assign orbital locations to balance the desires of the applicants, the actual traffic volume and distribution requirements of the applicants, constraints on satellite locations imposed by space station design limitations, announced plans of other countries for their own satellites, and broad considerations of fair treatment of existing and new domestic satellite operators. Moreover, we also seek to minimize disruption of service to existing domestic satellite users wherever possible.

5. This flexible orbital assignment process, rather than more traditional or conventional administrative selection mechanisms, has allowed new domestic satellite facilities to be constructed without the costs or delays of more traditional evidentiary or comparative hearings. Users have come to rely on the domestic satellites currently in service, and the continuation of these services with minimal interruption, as well as the orderly satisfaction of new and growing traffic requirements, is the principal measure of the efficacy of our licensing decisions today. With the long leadtimes, high costs, and risks associated with domestic satellites, our administrative practices must be fashioned to account for these features of the industry. We recognize, of course, that all applicants will not be completely happy with every orbital location assignment. However, such a result could not be avoided by any administrative selection process to date devised. Our orbital assignment process is, nevertheless, a reasonable exercise of our administrative discretion to insure that the benefits of domestic satellite technology are brought to the American public in a timely, economical and efficient manner.[9]

General Approach

6. The following table summarizes the number of orbital locations to be assigned to each space station licensee.[10] These figures

[8] *Id.*, *See also*, Western Union Telegraph Company, 47 FCC 2d 274 (1974).

[9] *See e.g.*, United States v. FCC, 652 F.2d 72 (D.C. Cir. 1980); 47 U.S.C. §§ 151, 154(i), 154(j) and 303.

[10] RCA American Communications, Inc. and Alascom, Inc. are joint licensees of one of the Satcom satellites included in this table under the RCA Americom name. In Western Union Telegraph Company, 86 FCC 2d 196 (1981), the Commission assigned two hybrid 4;6 and 12;14 GHz orbital locations to the Advanced Westar satellites to be operated by Space Communications Company (Spacecom). These satellites are no longer planned to be placed into commercial domestic satellite service by Spacecom. Thus, there is no need to continue the assignment of these two hybrid orbital locations for that purpose. *See* Western Union Telegraph Company, FCC-196, adopted today. As a result, only four locations are being assigned today for Westar satellites at 4;6 GHz because Western Union has only enough authorized facilities to effectively occupy four orbital locations on a long-term basis. *Id.*

include both today's authorization actions and the authorizations granted in 1980.

COMPANY NAME	NUMBERS OF ORBITAL LOCATIONS (AUTHORIZED) BY FREQUENCY BAND (GHz)					
	PREVIOUS (1980)		ADDITIONAL		TOTAL (1983)	
	4/6	12/14	4/6	12/14	4/6	12/14
Adv. Bus. Comm.	–	–	–	2	–	2
Am. Sat. Co. (Hybrid)	–	–	2	2	2	2
AT&T (CGC)	3	–	1	–	4	–
GSAT	–	2	–	–	–	2
Hughes	2	–	1	–	3	–
Rainbow Sat.	–	–	–	2	–	2
RCA Americom	4	–	2	3	6	3
SBS	–	3	–	2	–	5
SPCC (Hybrid)	2	2	1	1	3	3
Spacecom (Hybrid)	2	2	-2	-2	–	–
USSSI	–	–	–	2	–	2
WUT	2	–	2	–	4	–
TOTAL	15	9	7	12	22	21

As in our *1980 Orbit Assignment Order*, the orbital assignments we are making here will form the basis for beginning the international frequency coordination procedures. This plan also considers the launch schedule and other information provided to us by the applicants.

7. We will not summarize every argument made by individual applicants or petitioners as to why a particular orbit location should or should not be assigned to it or another applicant. We have fully considered each such argument. In all cases, the orbital locations assigned to an applicant provide a reasonable accommodation of its requests, taking into account the requirements of the other applicants and the objectives enunciated in today's *Report and Order*.

8. We will assign orbital locations today between about 70 ° and 143 ° West Longitude at 4;6 GHz[11], and between about 70 ° and 130 ° West Longitude at 12;14 GHz.[12] A few locations have been specifically identified as "unassigned" within these portions of the orbital arc in the Appendix. Moreover, additional orbital locations are available

[11] Orbital locations between about 55 ° and 143 ° West Longitude generally provide an earth station elevation angle of at least 5 ° throughout the contiguous states.

[12] Orbital locations between about 60 ° and 130 ° West Longitude provide a minimum 10 ° earth station elevation angle throughout the contiguous states. This higher elevation angle is desirable at 12;14 GHz to reduce the impact of increased propagation impairments at these higher frequencies compared to 4;6 GHz.

outside these ranges which can still be assigned to domestic satellites in the future.[13] In the central portion of this arc, agreements have been reached among the Administrations of Canada, Mexico and the United States on the placement of Canadian and Mexican domestic satellites.[14] The requirement to accommodate these other satellites effectively divides the usable orbital arc into an eastern sector and a western sector for United States domestic satellites. We will also address the orbital assignments we are making today to United States domestic satellites in terms of these two sectors for convenience.

9. In assigning orbital locations to domestic satellites, we have attempted to apply certain basic principles in addition to the orbital separation criteria adopted in today's *Report and Order*.[15] First, we have sought to minimize the number of relocations of satellites presently in orbit. While a few relocations appear unavoidable in implementing reduced orbital spacings to achieve the best overall use of the orbit and spectrum, we believe we have held them to the minimum practical. We have also tried to delay any needed relocations to the latest date possible. Thus, a significant amount of time is available to plan for such operations.

10. Second, we are implementing the orbital spacing criteria adopted in our *Report and Order* today. This means that orbital locations in the 12;14 GHz bands will be assigned at uniform 2 ° intervals beginning at the orbital position nearest to a Canadian or Mexican satellite that can be assigned to a United States satellite. We will also implement our selection of an average 2.5 ° orbital separation at 4;6 GHz in a similar fashion. Orbital separations of 3 ° will generally be provided between the first few 4;6 GHz domestic satellites to the west of a Mexican satellite at 116.5 ° West Longitude. This will provide each 4;6 GHz system with the capability of serving existing small antennas in all 50 states, particularly for the distribution of video and audio program material. By providing slightly larger spacings for these services during the next few years, existing users will be better able to amortize their current investment. Additional costs to upgrade or replace facilities needed to maintain signal quality are likely when these spacings are reduced to 2 ° to accommodate additional satellites in the future. To the east of the Canadian satellite at 104.5 ° West Longitude, orbital locations in the 4;6 GHz bands will be assigned at 2.5 ° intervals. Many

[13] *See e.g., 1980 Orbit Assignment Order, supra* note 4, at 598–599; applications of Cablesat General Corporation, File Nos. 2798/2799/2800-DSS-P/LA-82 which propose coverage of only a portion of the contiguous states by a single satellite.

[14] *See Report and Order, supra* note 2. We also expect that additional detailed coordination will also be required with Canada and Mexico to effectively implement this orbital arrangement. Licensees are expected to fully cooperate in these activities.

[15] *See also* our *1980 Orbital Assignment Order, supra* note 4, at 600–605.

services appear capable of satisfactory operation at such orbital spacings. With this magnitude of separation between the second and third satellites in the domestic satellite system operated by a licensee, the overall costs to users for new or upgraded equipment appear to be relatively small while the usable in-orbit capacity increases significantly. At the edges of the orbital arc usable to serve the United States, 2 ° orbital spacings at 4;6 GHz will be provided. Satellites located in this portion of the arc are proposed for longer term expansion of domestic satellite services. The installation of new 4;6 GHz earth station facilities will generally be required for operations in such new satellite networks in any event. Thus, they can also be designed to be compatible with 2 ° orbital spacings from the outset at little or no incremental cost beyond the initial investment cost of the facility.

11. Finally, we have attempted to maximize our ability to accommodate hybrid satellites in orbit in the same manner as we did in our *1980 Orbit Assignment Order*. We have also discussed the difficulties such satellites present in our *Report and Order*. However, because we are able to accommodate all hybrids proposed in the current group of applications without serious orbital use inefficiencies, we have not precluded their use at this time.

Western Orbital Locations

12. We have long recognized that the portion of the orbital arc between about 119 ° and 135 ° West Longitude is particularly well suited for domestic satellites providing services to all 50 states at 4;6 GHz.[16] Orbital locations at 119.5 ° West Longitude at 4;6 GHz and at 120 ° West Longitude at 12;14 GHz are available for United States satellites to the west of the proposed Canadian and Mexican domestic satellites. In this western portion of the arc, the Satcom III-R satellite was recently launched and positioned at 131 ° West Longitude location for operations at 4;6 GHz. Thousands of licensed receiving antennas are pointed at this satellite, and we have previously recognized the difficulties that would be entailed by its relocation.[17] Therefore, we will not require a relocation of Satcom III-R from its 131 ° West Longitude location. At 4;6 GHz, the orbital locations at this time of 131 °, 128 °, 125 °, 122 ° and 119.5 ° West Longitude between a Mexican satellite at 116.5 ° and 135 ° West Longitude provide 3 ° separations between all but one pair of satellites.[18] In the 12;14 GHz bands, orbital locations to the west of a

[16] *See e.g., 1980 Orbit Assignment Order, supra* note 4, at 597–600. However, 50 state coverage is still available from orbital locations outside this range. *Id.*

[17] *Id.* at 614.

[18] One 2.5 ° orbital spacing interval at 4;6 GHz permits a configuration of orbital assignments that does not require relocation of Satcom III-R. Uniform 3 ° separations at 4;6 GHz would necessarily require the 131 ° West Longitude location to be changed to 131.5 ° West Longitude. This particular set of 4;6 GHz

Canadian satellite at 117.5 ° West Longitude are available at 120 °, 122 °, 124 °, 126 °, 128 °, 130 ° and 132 ° West Longitude with uniform 2 ° spacings between United States domestic satellites. The 122 ° and 128 ° West Longitude locations are hybrid locations because they are coincident under the different spacing criteria for 4;6 GHz and 12;14 GHz adopted in the *Report and Order*.

13. Unless uniform 2 ° separations are implemented now at 4;6 GHz, any set of orbital assignments in this portion of the orbital arc that accommodates new satellites is going to require at least some relocation of current domestic satellites. The Westar V and Comstar D-4 satellites operational at 4;6 GHz have recently been positioned at 123 ° and 127 ° West Longitude, respectively. Neither of these two locations match the locations identified above as being available under a 3 ° spacing criteria at 4;6 GHz. Thus, either these satellites will have to be relocated to accommodate the new satellites to be positioned in this portion of the orbital arc, or some other spacing criteria will have to be developed involving even smaller separations between at least some of the satellites. However, any modified spacing criteria would also have to take under consideration the orbital locations to be assigned at 12;14 GHz. Two hybrid satellites with 50 state coverage requirements also need to be accommodated.

14. A great number of variations are possible. However, of the possible combinations of orbital arrangements at 4;6 GHz, the set of orbital locations identified above (i.e., 119.5 °, 122 °, 125 °, 128 °, 131 ° and 134 ° West Longitude) appears to make most overall efficient use of the orbit at 4;6 GHz when 12;14 GHz satellites spaced 2 ° apart are also considered.[19] This allows two hybrid locations at 122 ° and 128 ° West Longitude, with no orbital use inefficiencies at 12;14 GHz. However, the set of orbital assignments listed in the Appendix will require the relocation of Comstar D-4 from 127 ° to 125 ° West Longitude and Westar V from 123 ° to 119.5 ° West Longitude in the 1984 time frame.[20] The 134 ° West Longitude location, a slight shift

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locations also allows the identification of two hybrid locations between 120 ° and 135 ° West Longitude which at 12;14 GHz provide uniform 2 ° orbital spacings and 10 ° earth station elevation angles throughout the contiguous 48 states.

[19] The initial RCA domestic satellites, Satcom I and Satcom II, are located at 135 ° and 119 ° West Longitude, respectively. In our *1980 Orbit Assignment Order*, we assigned the 139 ° and 143 ° West Longitude locations to the replacements for these satellites. The 119 ° and 135 ° West Longitude locations were then reassigned to the initial satellites of Hughes and Southern Pacific. We also ordered RCA Americom and the other two licensees involved to closely coordinate their orbital operations to insure an orderly transition in the use of these orbital locations. Recent correspondence to the Commission raises questions about the willingness of the parties to promptly undertake such coordination. We expect this matter to be resolved promptly, and expect all parties to fully cooperate in the implementation of today's assignment plan. Failure to do so will require us to apply whatever sanctions are needed to enforce our orders.

[20] With the scheduled launch of the Westar VI and Telstar satellites before then, it should be possible to limit network outages to simple point-over maneuvers

from the 135 ° West Longitude location in our *1980 Orbit Assignment Order*, will continue to be assigned to the Galaxy I satellite of Hughes Communications for program distribution services. Other orbital assignments in this portion of the arc are set forth in the Appendix.

15. At 4;6 GHz, orbital locations with 50 state coverage capabilities are also available at 137°, 140 ° and 143 ° West Longitude with 3 ° orbital spacings. The recently launched Satcom V will continue to be located at 143 ° West Longitude for Alaskan services.[21] In our *1980 Orbit Assignment Order*, we assigned the 139 ° West Longitude location to the RCA Americom Satcom I-R satellite for in-orbit protection and specialized private-line services. If a uniform 3 ° spacing is maintained in this portion of the orbit, the available locations would be 137 ° and 140 ° West Longitude. However, we believe it prudent to provide for growth requirements by planning on 2 ° orbital separations in this portion of the orbital arc. Thus, the 139 ° West Longitude location will continue to be assigned to Satcom I-R. The 137 ° and 141 ° West Longitude orbital locations will be available for assignment to satellites that are cross-polarized with respect to Satcom.[22]

Eastern Orbital Locations

16. Under the current arrangements between the United States, Canada and Mexico, orbital locations are available to the United States at 101 ° West Longitude at 4;6 GHz and at 105 ° West Longitude at 12;14 GHz. In our *Report and Order*, we decided to generally assign 4;6 GHz orbital locations at 2.5 ° separations in this portion of the arc where satellites currently operate and provide at least some 50 state coverage. We also decided that 2 ° separations at 4;6 GHz would be provided for future expansion satellites in the easternmost portion of the arc where only 48 state coverage is possible.[23] Uniform separations of 2 ° are to be provided at 12;14 GHz.

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rather than more lengthy tracking operations as the satellite is slowly moved from one location to another. We also note that this arrangement will allow the Southern Pacific hybrid satellite to be adjacent to Westar V, as requested by Southern Pacific, to maximize the opportunities for dual feed earth station antennas to receive programming from both satellites.

[21] RCA Americom indicates it has renamed this satellite from Satcom II-R as it appeared in the *1980 Orbit Assignment Order*. *See* RCA Americom letter dated November 3, 1982. This satellite was sold to Alascom, Inc. upon its launch. *See* Alascom, Inc., FCC 82T-25, released October 25, 1982.

[22] Coordination of these locations with Mexico appears necessary in light of Mexico's recently announced plans for third and fourth satellites in this portion of the orbit.

[23] The 2.5 ° spacing at 4;6 GHz is intended to be a transition between an eventual 2 ° separation criterion to satisfy future traffic growth, and the perceived need at this time to delay replacement of recently installed small antennas. This magnitude of orbital spacing allows flexibility to accommodate existing networks

17. Beginning with the orbital locations for United States satellites closest to proposed Canadian satellites, we identify 101°, 98.5°, 96°, 93.5 ° and 91 ° West Longitude at 2.5 ° orbital separations at 4;6 GHz, and 105°, 103°, 101°, 99°, 97°, 95°, 93 ° and 91 ° West Longitude at 2 ° orbital separations at 12;14 GHz. We also note that hybrid satellites are possible at 101 ° and 91 ° West Longitude. Since the hybrid spacing is 10 ° in this case, the next hybrid satellite location is at 81 ° West Longitude.

18. In the 12;14 GHz bands, the 105 ° and 103 ° West Longitude locations approximate the current orbital assignments to GSAT[24] and 99°, 97°, and 95 ° the current orbital assignments to SBS.[25] Only the SBS satellites are actually in orbit at this time, although at slightly different locations.[26] No party has made a strong case opposing the continuation of these 1980 orbital assignments. However, they will have to be revised slightly to reflect the reduction from 3 ° to 2 ° in orbital spacing at 12;14 GHz.

19. However, we decline to honor the request of SBS for five contiguous orbital locations. First, such an arrangement would exclude from this portion of the orbital arc other applicants with frequency re-use satellites at 12;14 GHz which are also capable of providing some Alaska and Hawaii service.[27] SBS has not demonstrated sufficient 50 state traffic requirements to fill five satellites.[28] Other applicants are proposing satellites with greater dual frequency use and capability of providing Alaska and Hawaii services if located in this general portion of the orbital arc.[29] Thus, we believe that additional orbital locations in this portion of the orbital arc should be not assigned to SBS satellites, but should be assigned to those satellites which can more effectively utilize these locations to serve the public.

20. In summary, the 101 ° and 93 ° West Longitude locations at

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without immediate equipment replacement during the short-run. However, users of satellites in this portion of the arc are advised to begin planning now for 2 ° orbital separations at 4;6 GHz that may be needed in the future to accommodate additional growth requirements.

[24] GTE Satellite Corporation, 84 FCC 2d 562 (1981).

[25] Satellite Business Systems, 86 FCC 2d 180 (1981).

[26] The SBS satellites were placed into service at 100°, 97 ° and 94 ° West Longitude in 1980, 1981, and 1982, respectively.

[27] We have also previously analyzed some of the trade-offs in this portion of the arc between coverage of all 50 states and propagation difficulties in serving the southeastern section of the United States at 12;14 GHz with frequency re-use satellites. *See* GTE Satellite Corporation and Satellite Business Systems, *supra* notes 24 and 25.

[28] *See e.g.*, Satellite Business Systems, 77 FCC 2d 981 (1980). We would not necessarily object at this time to the operation of additional contiguous satellites by SBS if they are placed sufficiently closer together in orbit through appropriate internal system frequency management so as not to require relocation of any other satellite from its assigned location.

[29] Of course, satellites with cross-polarized frequency re-use and 50 state coverage capabilities can also operate successfully from other orbital locations to the west.

12;14 GHz will be assigned to satellites in the next group of applications which employ frequency re-use and which have the capability and in fact propose to serve the Alaskan and Hawaiian markets. We do not presently expect such satellites to be launched until 1986. Until then, SBS may continue to operate its satellites at the present locations of 100°, 97 ° and 94 ° West Longitude. However, SBS must eventually relocate its satellite at 100 ° to 99 ° West Longitude and its 94 ° satellite to 95 ° West Longitude to provide 2 ° separations at 12;14 GHz between its satellites and the satellites authorized to be launched into the 101 ° and 93 ° West Longitude locations at the time such satellites are in fact launched.

21. The 91 ° West Longitude orbital location is available in both the 4;6 GHz bands at 2.5 ° orbital separation intervals and the 12;14 GHz bands with 2 ° orbital separations. Thus, it will be assigned to a hybrid satellite. The 91 ° West Longitude orbital location is presently occupied by Westar III operating only at 4;6 GHz. That satellite was launched in 1979 with a nominal seven year lifetime[30], and will have to be relocated to accommodate a hybrid satellite at this location. However, with the launch of Westar VI, a 93.5 ° West Longitude location assignment at 4;6 GHz can be implemented with a point-over maneuver after a Westar satellite relocation. This may allow the hybrid location at 91 ° West Longitude location to be made available at an early date.[31]

22. To the east of 101 ° West Longitude, orbital locations can be identified in the 4;6 GHz bands at 98.5°, 96 ° and 93.5 ° West Longitude. The Westar IV satellite was recently launched into 99 ° West Longitude. The difference between 98.5 ° and 99 ° West Longitude does not appear significant. However, relocation of Westar IV to 98.5 ° West Longitude may require a significant earth station repointing exercise.[32] Thus, we believe that flexibility on the precise orbital position of Westar IV can be retained until the identity of the satellite to be located at 101 ° West Longitude is decided. Operations with 2 ° orbital separations at 4;6 GHz between Westar IV and that satellite may prove to be feasible and a relocation of Westar IV avoided.[33]

23. AT&T will be assigned 96 ° West Longitude and Hughes 93.5 ° West Longitude. Both appear to have requirements for 50 state services. Locations may not be available until 1984. First, we expect that AT&T will replace Comstar D-1/D-2 with a Telstar satellite at

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[30] Western Union Telegraph Company, FCC 79–444, released July 24, 1979.

[31] In light of the decision of the parties not to proceed with the Advanced Westar system, Western Union has no need for a hybrid location, such as the previously assigned 91 ° West Longitude location. Thus, Western Union cannot claim any preferred status with respect to the assignment of this orbital location to another satellite today. *Cf.*, RCA American Communications, 84 FCC 2d 633, 641 (1981).

[32] *See e.g.*, Comments of Equatorial Communications in CC Docket No. 81–704.

[33] A hybrid satellite is also possible at 101 ° West Longitude.

96 ° West Longitude. Hughes may then occupy the 93.5 ° West Longitude location with its third Galaxy satellite for 50 state coverage requirements.

24. With 2.5 ° orbital separations at 4;6 GHz and 2 ° separations at 12;14 GHz, the hybrid spacing interval is 10 ° of arc. Thus, after 91 ° West Longitude, the next regular hybrid locations are at 81 ° and 71 ° West Longitude. However, as discussed in paragraph 27, *infra*, an adjustment to 69 ° West Longitude will be made for the latter hybrid assignment. We will assign the 91 ° and 69 ° West Longitude locations to Southern Pacific and the 81 ° West Longitude location to American Satellite Company.

25. Orbital locations at 89°, 87°, 85°, 83 ° and 79 ° West Longitude will be assigned to satellites operating only in the 12;14 GHz bands. We decline to accept RCA Americom's request for three contiguous satellites in this portion of the orbit because it has not adequately justified an operational need for contiguous locations. SBS has indicated that its system has been designed for satellite operations only between 90 ° and 125 ° West Longitude. Given the three contiguous locations assigned in the center of this arc, we believe it appropriate that the fourth and fifth satellites be assigned locations at the extremities of this arc to maximize the number of the more desired locations available for initial assignments of other carriers. Thus, we will assign one of these 12;14 GHz locations between 79 ° and 89 ° West Longitude each to SBS, RCA Americom, Advanced Business Communications, United States Satellite Systems and Rainbow Satellite. RCA Americom's third 12;14 GHz satellite will be assigned a location farther to the east for 48-state coverage.

26. At 4;6 GHz, with 2.5 ° separations, orbital locations are available at 88.5°, 86 ° and 83.5 ° West Longitude between the hybrid locations of 91 ° and 81 ° West Longitude. However, because RCA Americom recently launched its Satcom IV satellite into 83 ° West Longitude to serve a large number of cable television systems, it may also be acceptable to maintain this satellite at 83 ° West Longitude, rather than 83.5 ° West Longitude, if the hybrid at 81 ° West Longitude is cross-polarized to the RCA Satcom design. One of the other 4;6 GHz locations mentioned above will be assigned to AT&T to replace Comstar D-3 and the other location will be assigned to the Westar system.

27. The next regular hybrid location would be 71 ° West Longitude. However, it is also desirable to begin implementing 2 ° orbital separations in this portion of the orbital arc. We also have to consider the plans of Colombia and Brazil for 4;6 GHz satellites at 75 ° and 70 ° West Longitude, respectively.[34] In reviewing the available options, the set of orbital locations at 78.5 °, 76 °, 74 °, 72 °, 69 ° and

[34] Pending completion of international frequency coordination, it appears that a 1 °

67 ° West Longitude at 4;6 GHz and 79 °, 77 °, 75 °, 73 °, 71 ° and 69 ° West Longitude at 12;14 GHz, appear to be consistent with these requirements and orbit use efficiency. However, in this case the hybrid location is 69 ° West Longitude. Generally, the satellites assigned orbital locations in this portion of the arc are expected to handle medium-to-long term growth requirements. Thus, sufficient time should be available to insure that the new ground facilities intended for operations with these satellites are compatible with 2 ° orbital separations.

28. To the east of 71 ° West Longitude, orbital locations will be assigned at uniform 2 ° intervals except as needed to effect international frequency coordination. Additional hybrid satellites can also be located in this portion of the orbital arc since the orbital separations will be 2 ° in both the 4;6 GHz and the 12;14 GHz bands, subject to international frequency coordination constraints.

Implementation

29. By this order, we are assigning orbital locations to currently authorized domestic satellites as set forth in the Appendix. All orbital location assignments are, of course, subject to change upon summary order of the Commission. Should changes be necessary, parties will be given 30 days notice. Several events could trigger the need for such changes. Examples include the need to reflect the results of international frequency coordination, the need to reflect changed operating or traffic conditions, or the need to accommodate additional satellites as a result of the processing procedures we are adopting today for the next group of domestic satellite space station applications.[35] Space station operators may proceed with the launch of satellites into the orbital locations listed in the Appendix without further authorization from the Commission.[36] The orbital locations listed in the Appendix will also form the basis for our international frequency coordination efforts, and the satellite licensees are required to provide the Commission with the necessary information at the earliest practical date, as well as other technical assistance needed to successfully complete these procedures.

30. In developing this plan of current orbital assignments, we have no intention of disuading operators from identifying alternative assignments which might be more compatible with launch

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separation from a Colombian SATCOL satellite at 75 ° West Longitude and a 1 ° separation from a Brazilian SBTS satellite at 70 ° West Longitude are desirable to assist our coordination efforts.

[35] *Memorandum Opinion and Order, supra* note 3.

[36] *See generally, 1980 Orbit Assignment Order, supra* note 4 at 609–613; *Report and Order, supra* note 2. Temporary authorizations may be granted for transitional arrangements, or for the continued operation of earlier launched satellites after their replacements. However, no such temporary operation will be permitted to hinder the implementation of the plan of orbital spacings specified in the Appendix.

schedules or interference considerations. We welcome requests for reassignments of orbital locations to achieve such ends. However, such requests must be consistent with the basic structure of this plan, and should have the agreement of all, or at least most, of the satellite operators affected by the exchange of locations. Also, temporary transitional arrangements to implement these assignments may be needed for reasons of operational efficiency. They too may be proposed. Any such alternative orbital arrangement must be presented to the Commission for approval within 30 days of the release of this order if it is to be evaluated at an early stage in the international frequency coordination procedures that will be started for the current orbital assignment plan listed in the Appendix. In any event, we expect all operators to cooperate fully in the course of implementing this plan. All satellite operators are also required to coordinate their orbital maneuvers with other affected satellite operators. Particular problems, if they can not be resolved by the parties, can be brought to the Commission for resolution.

31. In the past, we have been reluctant to identify unassigned orbital locations and@or reserve them for future use. We continue to believe that our orbital assignment policies and decisions should be premised on accommodating only firm requirements, rather than preserving options for clearly speculative ventures. We have expressed concern with the ability of several of the operators receiving authorizations today to proceed promptly with the construction and launch of the proposed satellites. However, as explained in today's *Report and Order*, the conditions imposed in their authorizations will insure that the orbital locations tentatively assigned to them will be available for re-assignment at an early date if they fail to fulfill the representations made in their applications.

32. Moreover, it is clear that additional, qualified companies are willing and ready to enter the market, and current and newly authorized operators are confident that their systems will grow to the point of requiring additional orbital locations in the coming years. Thus, we are identifying several, but not all, potential orbital locations that will be available for satellites in this next group of applications even if further reductions in orbital separations are not made. Additional orbital locations are also available for assignment outside the range of locations listed in the Appendix.

33. Thus, operators may propose exchanges or small adjustments of their orbital assignments without necessarily becoming part of the next processing group. However, we do not intend to assign any of the explicity unassigned locations outside of the proceeding we are beginning today for processing the next group of applications. We also do not intend to assign any additional orbital locations(s) that might become available through default of one of today's grantees until we act on the next group of space station applications. Thus, if existing operators desire additional locations, their requests must be

made in accordance with the procedures and time-frame we are adopting by separate order.[37]

34. At least some of the rule revisions being adopted today in CC Docket No. 81–704 to achieve reduced orbital separations will not become effective until 30 days after their publication in the Federal Register. We have also indicated that changes in assigned orbital locations would be made by summary order but upon 30 days notice. Therefore, to insure that all the procedural requirements of the Administrative Procedure Act have been fully satisfied, we will make both our *Report and Order* and this orbital assignment order effective 30 days after publication in the Federal Register.

35. At the same time, however, we have no desire to impose any further delays on the construction and launch of either presently authorized satellites or those satellites we have initially approved today. We therefore believe that the satellite operators should be permitted to proceed immediately with the implementation of their facilities provided such activities are consistent with today's decisions. Because it can be argued that our authorizations today can take effect only when the reductions in orbital separations also take effect, we will designate the effective date of today's authorizations also to be 30 days after publication of the *Report and Order* in the Federal Register. All of today's rule, policy and facility authorization decisions therefore will take legal effect at the same time in the interest of consistency and to insure all statutory notice requirements are satisfied. In the meantime, however, all grantees are authorized[38] to proceed immediately at their own risk with the construction, launch and operation of the satellites authorized today, including procurement of launch services, provided such activities are consistent with the terms and conditions of the station authorizations and today's decisions.

Conclusion

36. We find, upon review of the applications and record before us, that the public interest, convenience and necessity will be served by the adoption of the orbital location assignments specified in the Appendix.

37. Accordingly, IT IS ORDERED that the orbital location plan specified in the Appendix IS ADOPTED and the grantees of such outstanding space station authorizations shall promptly undertake such actions as are necessary to implement this orbital location plan,

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[37] *Memorandum Opinion and Order, supra* note 3. As noted above, we encourage exchanges of orbital locations among grantees if such exchanges result in more efficient or effective orbital use or service to the public.

[38] *See e.g.*, Sections 214, 309 and 319 of the Communications Act, as amended, 47 U.S.C. § § 214, 309 and 319, for our authority to permit such activities to begin immediately.

including coordination with other satellite operators, in accordance with the policies, terms, conditions and procedures specified above, and to the policies and procedures adopted in today's *Report and Order* in CC Docket No. 81–704, FCC 83–184.

38. IT IS FURTHER ORDERED that the orbital location assignments specified in *Orbit Deployment Plan - Domestic Satellite*, 84 FCC 2d 584 (1981), *Hughes Communications, Inc.*, 84 FCC 2d 578 (1981), *Southern Pacific Communications Company*, 84 FCC 2d 650 (1981), *COMSAT General Corporation*, 84 FCC 2d 547 (1981), *RCA American Communications, Inc.*, 84 FCC 2d 633 (1981), *Western Union Telegraph Company*, 86 FCC 2d 196 (1981), *Satellite Business Systems*, 86 FCC 2d 180 (1981) and FCC 82–489, released November 10, 1982, and *GTE Satellite Corporation*, 84 FCC 2d 562 (1981) ARE MODIFIED in accordance with the orbital location assignment plan specified in the Appendix, subject to the policies, terms, conditions and procedures specified above, and to the policies and procedures adopted in today's *Report and Order* in CC Docket No. 81–704, *supra*.

39. IT IS FURTHER ORDERED that the temporary assignment of any orbital location is subject to change by summary order of the Commission on 30 days notice and does not confer any permanent right to the use of the orbit or spectrum. Such a change may be ordered *inter alia* to implement uniform 2 ° separations, to require colocation of inorbit satellites in the event of excess spare capacity, or to implement any of the objectives or policies set forth in today's *Report and Order* in CC Docket No. 81–704, *supra*, or this decision. No space station authorization, nor any right granted by such authorization, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, or by transfer of control of any corporation holding such authorization, to any person except upon application to the Commission and upon a finding by the Commission that the public interest, convenience, and necessity will be served thereby.

40. IT IS FURTHER ORDERED that the Secretary of the Federal Communications Commission shall cause this order to be published in the Federal Register.

41. IT IS FURTHER ORDERED that these orbital assignments shall become effective 30 days after publication of the *Report and Order* in CC Docket No. 81–704, *supra*, in the Federal Register, but grantees ARE AUTHORIZED to proceed immediately upon the adoption of this order with construction, launch and in-orbit operations of authorized satellites in accordance with these orbital assignments and the outstanding station authorizations.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Appendix

APPENDIX

1983 Orbital Assignments

Orbital Positions (West Longitude)	*User*	*Frequency Band(s)*
143°	SATCOM V	4/6 GHz
141°	Unassigned	4/6 GHz
139°	SATCOM I-R	4/6 GHz
137°	Unassigned	4/6 GHz
134°	GALAXY I	4/6 GHz
132°	Rainbow	12/14 GHz
131°	SATCOM III-R	4/6 GHz
130°	ABCI	12/14 GHz
128°	American Satellite	4/6 GHz and 12/14 GHz
126°	RCA	12/14 GHz
125°	TELESTAR/COMSTAR	4/6 GHz
124°	SBS	12/14 GHz
122°	SPACENET	4/6 GHz and 12/14 GHz
120°	USSSI	12/14 GHz
119.5°	WESTAR V	4/6 GHz
117.5°	Canada	12/14 GHz
116.5°	Mexico	4/6 GHz and 12/14 GHz
113.5°	Mexico	4/6 GHz and 12/14 GHz
112.5°	Canada	12/14 GHz
111.5°	Canada	4/6 GHz
110°	Canada	12/14 GHz
108°	Canada	4/6 GHz
107.5°	Canada	12/14 GHz
105°	GSTAR	12/14 GHz
104.5°	Canada	4/6 GHz
103°	GSTAR	12/14 GHz
101°	Unassigned	4/6 GHz and 12/14 GHz
99°	SBS	12/14 GHz
98.5°	WESTAR IV	4/6 GHz
97°	SBS	12/14 GHz
96°	TELSTAR	4/6 GHz
95°	SBS	12/14 GHz
93.5°	GALAXY III	4/6 GHz
93°	Unassigned	12/14 GHz
91°	SPACENET	4/6 GHz and 12/14 GHz
89°	SBS	12/14 GHz
88.5°	TELSTAR	4/6 GHz
87°	RCA	12/14 GHz
86°	WESTAR	4/6 GHz
85°	USSSI	12/14 GHz
83.5°	SATCOM IV	4/6 GHz
83°	ABCI	12/14 GHz
81°	American Satellite	4/6 GHz and 12/14 GHz
79°	Rainbow	12/14 GHz
78.5°	WESTAR	4/6 GHz
77°	RCA	12/14 GHz
76°	TELSTAR	4/6 GHz
75°	Unassigned	12/14 GHz
74°	GALAXY	4/6 GHz
73°	Unassigned	12/14 GHz

Orbital Positions (West Longitude)	*User*	*Frequency Band(s)*
72°	SATCOM	4/6 GHz
71°	Unassigned	12/14 GHz
69°	SPACENET	4/6 GHz and 12/14 GHz
67°	SATCOM	4/6 GHz

Fairness Doctrine, Controversial Issue of Public Importance
Fairness Doctrine, Personal Attack

Under the Commission's personal attack rule, broadcaster incurs obligations only when an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, during the discussion of a controversial issue of public importance.
–Eulogio Cardona y Beltran

FCC 83–262

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Complaint of
EULOGIO CARDONA Y BELTRAN
against
RADIO STATION WFBA [1]
San Sebastian, Puerto Rico

ORDER

(Adopted: May 26, 1983; Released: June 3, 1983)

BY THE COMMISSION: COMMISSIONER FOGARTY NOT PARTICIPATING; COMMISSIONER SHARP ABSENT.

1. The Commission has before it an Application for Review of the Broadcast Bureau ruling of November 9, 1981,[2] filed by Mr. Eulogio Cardona y Beltran.

2. After a careful review of the information before us, we believe that the Broadcast Bureau's ruling is correct and the Application for Review does not contain sufficient grounds to warrant reversal or alteration.

3. In order for the personal attack rule to be applicable, an attack upon a person or group's "honesty, character, integrity or like personal qualities" must occur "during the discussion of a controversial issue of public importance." The burden is on the complainant to establish that a discussion during which an alleged attack occurred was both controversial and of public importance. Initially, Mr.

[1] On January 15, 1982, the Commission granted assignment of the license for WFBA. On July 12, 1982, the present licensee was given Commission approval to change its call sign to WLRP.

[2] A copy of that ruling is attached (Appendix.)

Beltran identified the issue discussed as "the financial dealings of the different sport franchise holders and the corrective action that the legislative branch of the local government should take." We agree with the Bureau that the licensee was reasonable in determining that this does not constitute a controversial public issue. We further agree with the Bureau that subsequent recharacterization of the issue by Mr. Beltran that the real "issue in controversy is if Mr. Cardona y Beltran is entitled to equal time to answer . . . the attack," also fails to demonstrate the licensee's unreasonableness.

4. Accordingly, pursuant to Section 1.115(g) of the Commission's Rules and Regulations, the Application for Review IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

APPENDIX

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

Nov. 9, 1981

680

IN REPLY TO:

8330-L

C8-607

C9-269

Mr. Eulogio Cardona y Beltran
c/o Celso E. Lopez II, Esq.
Apartado AA
San Sebastian, Puerto Rico 00755

Dear Mr. Beltran:

This refers to your complaint filed on June 26, 1981, against radio station WFBA, San Sebastian, Puerto Rico. You state that on May 4, 1981, Mr. Felix Bonet-Velez, President and principal stockholder of WFBA, falsely accused you "of being a fraudulent sport leader and of personally and improperly stealing a substantial amount of money belonging to the San Sebastian softball team." You maintain that these comments constituted attacks upon your honesty, character and integrity during the presentation of a controversial issue of public importance. You define the controversial issue as "the financial dealings of the different sport franchise holders and the corrective action that the legislative branch of the local government should do to stop allegedly fraudulent actions of the franchise holders." You allege that station WFBA has failed to meet its obligations under the personal attack rule by failing to notify you, provide a tape or accurate summary of the broadcast and present you with an opportunity to reply. You also state that the station has failed to respond to your complaint.

On July 1, 1981, we asked the station if it had replied to your complaint and if it had not, what its reasons were. On July 21, 1981, Pepino Broadcasters, Inc., licensee of station WFBA, filed its response to our inquiry and, rather than discuss why it did not

reply to your complaint, it commented on the merits. It explains that in Puerto Rico organizations often raise money by conducting street fairs called "verbenas" which are licensed by the government and conducted on public property. The view of WFBA management is that organizations obtaining licenses should be required to report and account to the municipal government how much money was raised at the verbenas. The licensee apparently believes that you have defined this issue, financial accountability, as the controversial issue of public importance which was being discussed when you were allegedly attacked. The licensee states that it believes that your complaint is based on the fact that the station expressed its view on this issue about the time that you and the local softball team held a verbena. However, the licensee contends that this issue was discussed in general terms, with no specific mention of you or your organization. The licensee further states that nothing was discussed which "could possibly come under the 'personal attack rule'", and "no charge was made or implied that any impropriety or irregularity had been, or would be, made in connection with the

Mr. Eugene Cardona y Beltran

verbenas held by . . . [the local softball team] or any other organization." The licensee also questions whether the issue of financial accountability is "of sufficient controversy to raise an issue under the Fairness Doctrine." It states that it is not aware that the matter has been discussed in any other public forum or has been written about in the press. It also declares that if this issue is considered to be a controversial issue of public importance, you had the opportunity to express your viewpoint on Station WFBA, May 9 and 16, 1981.[1]

You filed reply comments on August 18, 1981, and supplemental comments on September 9, 1981. You deny the licensee's contention that the controversial issue of public importance you defined was whether organizations which hold verbenas should account financially to the municipal government. You maintain that you agree with the licensee's viewpoint on this issue and have informed the public of the money raised at your verbena. You claim that the station is acting in bad faith and is attempting to confuse the Commission by focusing your dispute with it on this issue. You state, "What the present complaint involves is a false accusation made by Mr. Bonet-Velez over the airwaves stating that Mr. Cardona y Beltran stole money from a local softball team," and "the issue in controversy is if Mr. Cardona y Beltran is entitled to equal time to answer the personal attack leveled against him." You argue that Mr. Velez has "lied" to the Commission by denying that the broadcast accused you of appropriating money, and therefore he is morally unfit to be a Commission licensee. You state, "the truth of the matter is not only a charge was made about an alleged irregularity, a direct accusation was leveled against Mr. Cardona y Beltran claiming that he personally stole $4,000.00."

In addition, you submit two affidavits with your August 18 reply. One affidavit is from Mr. Ismael Rosado Vega, who summarizes what he heard on the May 4 broadcast, and the other affidavit is from Mr. Severiano Mendez Gonzalez, treasurer of the local softball team.[2] In your September 9 pleading, you assert that Mr. Velez engaged in further misconduct by questioning Mr. Vega in an attempt to discredit his testimony and obtain a statement from him denying that his affidavit was self-prepared. You submit a second affidavit from Mr. Vega, attesting to this conduct by Mr. Velez and stating that Mr. Velez "threatened" him.[3]

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[1] The licensee asserts that Mr. Beltran conducts a program of his own on WFBA and has spent approximately ten minutes discussing the financial accountability issue.

[2] The substance of these affidavits is more fully discussed below.

[3] Mr. Vega states, "he (Mr. Velez) made an implied threat concerning the collection of information about numerous persons with the purpose of using that information in the allocation of the station public service air time."

Mr. Eugene Cardona y Beltran

DISCUSSION

A broadcaster's obligations under the personal attack rule are triggered only if there has been an attack upon honesty, character, integrity or like personal qualities of an *identified* person or group, during the discussion of *a controversial issue of public importance.* It is unclear from the pleadings before us what issue you have defined as the controversial issue of public importance which was being discussed when you were allegedly attacked. The licensee believes that you defined the controversial issue as whether one should account to the local government how much money was raised at a verbena held on public ground. However, you deny that this issue is controversial. In your supplemental pleading of September 9 you state that the controversial issue is whether you are entitled to equal time to answer the personal attack against you. However, the personal attack rule generally does not apply to this type of issue. The Commission has made it clear that criticism of a complainant, itself, does not create the necessary controversial issue of public importance. The Commission has stated:

> Several of the comments in this proceeding indicate the mistaken impression that an attack on a specific person or group constitutes, itself, a controversial issue of public importance. . . . This misconceives the principle, based on the right of the public to be informed as to the vital issues of the day, which requires that an attack must occur within the context of a discussion of a controversial issue of public importance in order to invoke the personal attack principle. The use of broadcast facilities for the airing of mere private disputes and attacks would raise serious public-interest issues, but such issues are not the focus of the Fairness Doctrine. *[Personal Attacks; Political Editorials,* 8 FCC 2d 721, 725 (1967)].

Thus, for the personal attack rule to apply, you must demonstrate that you were personally attacked during the discussion of a controversial issue of public importance; specifically identify the issue; and establish why it is controversial and of public importance. To establish that an issue is controversial you must show that the issue is subject to vigorous debate with substantial elements of the community in opposition to one another. To establish that an issue is of public importance you must demonstrate the degree of attention paid to it by government officials, community leaders, and the media, and the impact that the issue has on the community. *Fairness Report,* 48 FCC 2d 1, 11 (1974).

There is also a question as to whether you or your organization were specifically identified during the May 4 broadcast and whether an attack was made on your financial propriety. The licensee denies that you were identified or that there was "anything that could possibly come under the

Mr. Eugene Cardona y Beltran

personal attack rule." According to the affidavit you submitted from Mr. Ismael Rosado Vega, in which he summarizes the May 4 broadcast, it appears that your name was never mentioned. The affidavit states in part:

> He [Mr. Bonet-Velez] called on the local government to stop *certain person* who disguised themself [sic] as sport leader and get a team and later on claim he lost money. He said of a *certain man* who asked to be allowed to celebrate a "Verbena" because he had lost more than $1,000.00 out of his pocket.
>
> Mr. Bonet-Velez stated that *this man* sold the "Verbena" for $2,500.00 and had other incomes which totally [sic] $5,000.00. He asked if the losses were $1,000.00 where are the $4,000.00 remaining? [Emphasis added]

Mr. Vega also states that a considerable number of people contacted him and asked if you had "appropriated" this money. Further, the affidavit you submit from Mr. Severiano Mendez Gonzalez states that a considerable number of people approached him and asked "about the accusation made by Mr. Felix Bonet-Velez against Mr. Eulogio Cardona y Beltran regarding the illegal appropriation by Mr. Beltran of the amount of $4,000.00 belonging to the local softball team." He also asserts, that as treasurer of the local softball team, he can attest that none of the money raised at the verbenas has been stolen.

The Commission has held that a personal attack must be made on an identified person or group. The burden is on the complainant to establish this or to show that the attack was understood by the general public to be directed towards a specific group or individual. *Horace Rowley III*, 69 FCC 2d 1074 (1978). You have not established that it was unreasonable for the licensee to conclude that you were not identified in the May 4 broadcast or that the general public would not identify you. Although you assert that a considerable number of people inquired about the broadcast, you have furnished no information to show that a substantial segment of the community knew that the remarks were directed against you. *C.f. Station WBAX*, 17 FCC 2d 316 (B/c Bur. 1969). Accordingly, in light of your failure to establish that a controversial issue of public importance was discussed and that a personal attack was directed at you, we cannot conclude that the licensee incurred any obligations under the Personal Attack rule.[4]

Mr. Eugene Cardona y Beltran

With respect to the allegation that Mr. Velez "threatened" Mr. Vega, we see no grounds for Commission intervention. Mr. Vega's claims that Mr. Bonet-Velez "made an implied threat concerning the collection of information about numerous persons with the purpose of using that information in the allocation of the station public service air time." You assert that the station plans to use this information "as a reference to steer to or away from them the station public service programs." It is not clear what this means. However, we should point out that the Commission interferes in a broadcaster's programming decisions or in its selection of issues or spokespersons only to the very limited extent permitted by the Fairness Doctrine and its corollary, the personal attack rule. In addition, broadcasters are licensed to serve the public interest and they must make decisions based on public interest considerations, not private interest considerations. The statement above, however, does not appear to indicate that the licensee is not serving the public interest. Therefore, absent conduct violative of Commission's rules and regulations, a statement by the licensee that it is collecting information to use in its allocation of air time does not warrant Commission involvement.

Staff action is taken here under delegated authority. Application for Review by the full Commission may be requested within 30 days of the release date of this letter by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration and, if mailed, should be sent by certified mail. Copies must be sent to the parties to the complaint. See Code of Federal

[4] In a subsequent affidavit dated August 31, 1981, Mr. Ismael Rosada Vega states, "That on May 4, 1981, I heard Mr. Bonet-Velez broadcast where he accused Mr. Eulogio Cardona y Beltran of stealing money from the local softball team." This appears to be Mr. Vega's interpretation of the May 4 broadcast and not an assertion that your name was mentioned on the broadcast, since the information submitted in Mr. Vega's first affidavit indicated that there was no reference to you by name.

Regulations, Volume 47, Section 1.115.

Sincerely,

Stephen F. Sewell, Assistant Chief
Complaints and Compliance Division
Broadcast Bureau

Channel Assignment
FM Stations, Class A, B, C
Frequency Assignment
Station Separation
Table of Assignments

Final rule making order adopted to permit the operation of an increased number of FM broadcast stations. Rule changes were needed to meet the demand for FM broadcast service that could not be satisfied under the present rules. New rules allow Class A stations to operate on all channels, authorize three new classes of stations, and reclassify existing stations, after a period of three years, according to their operating facilities.
–FM Broadcast Stations
BC Docket No. 80–90

FCC 83–259

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Modification of FM Broadcast Station Rules to Increase the Availability of Commercial FM Broadcast Assignments.	BC Docket No. 80–90 RM-2587 RM-3226 RM-3367

REPORT AND ORDER
(PROCEEDING TERMINATED)

(Adopted: May 26, 1983; Released: June 14, 1983)

BY THE COMMISSION: COMMISSIONER QUELLO DISSENTING AND ISSUING A STATEMENT; COMMISSIONER FOGARTY NOT PARTICIPATING; COMMISSIONER RIVERA ISSUING A SEPARATE STATEMENT; COMMISSIONER SHARP ABSENT.

INTRODUCTION

1. The Commission's *Notice of Proposed Rule Making* ("*Notice*") in this proceeding suggested a number of rule changes to increase the availability of FM stations within the present assignment structure.[1]

[1] 78 FCC 2d 1235; 45 Fed. Reg. 17602; adopted February 28, 1980.

2. The FM band extends from 88–108 MHz and is divided into 100 channels numbered from 201 to 300. The lower 4 MHz contains Channels 201 to 220 and is reserved for noncommercial educational stations. The upper 80 channels between 92 MHz and 108 MHz may be used by both commercial and noncommercial stations. The use of these channels is governed by the FM Table of Assignments ("Table") found in Section 73.202(b) of the Commission's Rules. It provides a listing of communities in which stations are operating, or may operate, and the channel on which they must transmit.

3. When a new station is desired, the Table must be amended through a rule making proceeding to add the requested community and channel. The proposed station must be located a sufficient distance from pertinent co-channel and adjacent channel stations and still be capable of providing a strong signal over the desired community. The distance separation requirements are based upon the assumption that each station is currently, or at some future time will be, operating with maximum facilities (effective radiated power, "ERP," and antenna height above average terrain, "HAAT"). Thus, the Table permits stations to begin operating with less than maximum facilities and to increase them as their financial situations improve.

4. The Commission authorizes three classes of FM stations. Class A stations operate only on 20 designated channels and have a service radius of 15 miles. The service radius is determined from the co-channel distance separation requirements, which provide protection from interference to approximately the station's 1 mV/m contour. Class B or C stations operate on the remaining 60 channels. Whether a station is designated Class B or Class C depends upon its geographic location. Class B stations are assigned in the more densely populated parts of the nation and have a service radius of 40 miles, representing protection of their 0.5 mV/m contour. Areas where Class B stations may be located are designated Zones I and I-A. Class C stations are assigned elsewhere (Zone II) and have a service radius of 57 miles, representing protection of their 1 mV/m contour.

5. The *Notice* recognized that under the present allotment rules, additional service cannot be offered to many parts of the nation where demand has not been satisfied. Commission studies identified three existing standards that appeared to limit new FM service:

(a) Class A stations may operate only on 20 designated channels, thereby foreclosing substantial areas from using the 60 Class B/C channels for these smaller stations;

(b) the distance separation requirements assume stations are operating with maximum permissible facilities, although 80% of the Class C stations and 35% of all FM stations were not operating with maximum, or near maximum, facilities at the time the *Notice* was adopted; and

(c) the Class B separations, which reflect protection of the 0.5 mV/m field strength

contour rather than the 1 mV/m contour, prohibit many communities from obtaining additional FM allotments.

6. Based on these findings, the Commission proposed to respond to the continuing demand for FM assignments by:

(a) allowing stations with Class A facilities to operate on the 60 Class B/C channels if a Class A channel was not available;

(b) increasing the number of classes allowed from three to five by adding Class B1 (operating facilities between Classes A and B) and Class C1 (operating facilities between Classes B and C) stations, so protection would more closely approximate service area;

(c) permitting Class B stations to operate in the same areas as Class C stations (Zone II);

(d) adopting a new distance separation table based on providing uniform protection to the 1 mV/m (60 dBu) contour of all stations (the primary impact of the adoption of this proposal would be on Class B stations whose separations are now based on the 0.5 mV/m contour);

(e) requiring existing Class B and Class C stations operating with less than maximum, or near maximum, facilities to reach the minimum power and antenna height specified for the new classification system within three years, or be reclassified based on their actual operating facilities; and

(f) allowing *new* Class C stations six years to reach their minimum power and antenna height requirements because they would be the only class of station to have a minimum antenna height requirement.[2]

7. Central to the *Notice's* proposals was the retention of the basic Table of Assignments framework. It did not propose to modify the allotment structure represented by the Table. Instead, the Commission sought to focus on those changes that could achieve immediate benefits and to defer consideration of more complex proposals until a later date. These included such matters as terrain shielding, directional antennas, etc.

8. Those parties that submitted comments and reply comments that relate directly to our discussions are listed in Appendix A.* Seven months after the close of the reply comment period, the National Radio Systems Committee ("NRSC") submitted new FM receiver measurement data.[3] On August 3, 1982, the Commission reopened the record to accept the NRSC report and two others filed by

[2] The Commission also proposed to adopt the International System of Units (commonly termed the metric system) for the FM broadcast service because it was considering modifying many of the technical rules.

[3] The National Radio Systems Committee is co-sponsored by the EIA and the NAB and "is comprised of persons from the broadcasting and electronics manufacturing industries and others interested in improving the overall technical quality of radio broadcasting and reception. The NRSC by its charter does not assume a position of advocacy on any matter before the Federal Communications Commission or any other governmental body. One function, however, is to provide agencies with information on transmitting and receiving technology which may be used in rulemaking proceedings."

[Committee description taken from the comments of the NRSC; October 16, 1981.]

the Advisory Committee on Radio Broadcasting ("Advisory Committee").[4] In addition to accepting the reports, the Commission allowed 30 days for other parties to comment on these late-filed studies.[5]

9. Subsequently, the Advisory Committee submitted additional reports and again requested that the Commission re-open the record to accept them and to request comments on their findings.[6] The Commission declined the Committee's request stating that it would consider the reports to be *ex parte* comments submitted under the guidelines governing non-restricted proceedings. Thus, the Commission could consider these reports in its deliberations and any other comments submitted in response to the filing of the reports could also be considered to be *ex parte* comments.

Summary of Actions Taken

10. The Commission has reviewed each of the comments filed. Based on that review, we have decided to amend the rules in the following manner:

(a) Class A stations will be allowed on Class B/C channels;

(b) the distance separation requirements will *not* be modified for existing station classes to reflect uniform protection to the 1.0 mV/m contour (thus, separations for Class B stations in Zones I and I-A still will be based on the 0.5 mV/m contour rather than the 1.0 mV/m proposed);

(c) one new class of station, Class B1, with an expected service range of 45 kilometers (28 miles), will be allowed to operate in Zones I and I-A;

(d) two new classes of stations, Classes C1 and C2, with expected service ranges of

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[4] The Commission acted in response to a petition from the Advisory Committee. This committee evolved from the "Advisory Committee on AM Broadcasting in Region 2." The latter committee was established to advise the staff of the Commission during its preparation for, and participation in, the International Telecommunications Union Regional Administrative Conference on AM Broadcasting in the Western Hemisphere. The purview of the AM conference committee was expanded to include FM broadcast issues when its charter was amended on September 10, 1980. It was renamed the "Advisory Committee on Radio Broadcasting" and its organization was altered to specify two subgroups within the committee. One subgroup was to address technical matters while the other concentrated on spectrum allocation matters. [See the *Memorandum Opinion and Order* issued by the Commission on September 22, 1980 (FCC 80–537).]

[5] The studies are entitled: (1) *Report to the National Radio Systems Committee from the FM Subcommittee Task Force*, July 24, 1981 ("NRSC Report"); (2) *FM Broadcasting Receiver Characteristics and Protection Criteria*, July 7, 1982, ("Technical Subgroup Report"); and (3) *Report on FM Allocation Policies*, July 9, 1982 ("Allocations Subgroup Report").

[6] The studies submitted by the Advisory Committee are entitled: *Subjective Evaluations of Audio Degraded by Noise and Undesired FM Signals* ("Subjective Audio Study"), November 17, 1982; *A Study of FM Station Mileage Separations* ("Mileage Separations Study"), November 17, 1982; *Potential Effects of BC Docket No. 80–90 on FM SCA Operations* ("SCA Study"), November, 1982; and *A Study of Stereo Radio Listening* ("Stereo Listening Study"), December 7, 1982.

72 kilometers (45 miles) and 52 kilometers (32 miles), respectively, will be allowed to operate in Zone II;

(e) existing stations will be required to meet minimum facility requirements within three years or be reclassified to a station class based on the new classifications. For Class C stations, a minimum antenna height requirement of 300 meters (984 feet) HAAT will be adopted;

(f) new Class C stations will be required immediately to meet minimum facilities rather than being provided six years within which to comply; and

(g) the rules contained in the FM service will be converted to the International (metric) System of Units.

These amendments are intended to provide for additional FM stations in many parts of the country and still permit existing stations to provide service equivalent to that embodied in the present allotment rules. They represent, in our best judgment, the optimum rule changes necessary to allow new stations while preserving the unique qualities of the FM service.

ANALYSIS OF THE RECORD

11. Our analysis of the record in this proceeding first will set forth those comments that relate generally to the legal and policy issues presented in the *Notice*. After a summary and discussion of those comments, we will proceed to a recitation and analysis of those comments that addressed general technical issues. Then the record on each specific proposal set forth in the *Notice* will be summarized and discussed. Finally, we will discuss various matters that are ancillary to the adoption of the changes set forth in paragraph 10, *supra*, including the implementation of those changes.

Legal and Policy Matters

12. A number of parties argued that sufficient information was not available, nor sufficient thought given, for the proposals in the *Notice* to be satisfactorily considered. ABC, NAB, and other parties urged the Commission to develop a master plan for an integrated AM and FM aural broadcast service before seriously considering any deviations from the existing service structures. They claimed the current approach of instituting separate proceedings for each service represented a conviction to create new radio outlets without regard to public service costs. Cox and Multimedia supplied detailed historical perspectives of the development of the FM service. Noting FM's complementary nature to the AM service, they argued that the suggested modifications be considered in an omnibus proceeding.

13. ABC also argued that the instant proceeding is an ineffective mechanism for dealing with important issues such as demand, economic viability, appropriate service area size, assignment priorities, and viable alternatives. The Advisory Committee urged the Commission to make more extensive economic studies of FM stations

before taking final action. Its reports to the Commission, along with comments submitted by NBC and ABC, cited economic losses and small profit margins as indications that further competition would be undesirable in many situations. PAB and NRBA claimed that additional outlets in marginally profitable markets would result in less local news and public affairs programming. ABC pointed out that, according to several court decisions, the Commission is expected to assess the merits of adding new broadcast stations by balancing public service gains against losses.

14. Some parties argued that demand by potential broadcasters does not represent a public interest determination as required by the Communications Act. Still others claimed that adoption of the proposals in the *Notice* would violate Section 307(b) of the Communications Act, which requires a "fair, efficient and equitable distribution of radio services." They suggested that these factors only can be fully examined if the Commission issues a Notice of Inquiry into these subjects before proposing specifics in a Notice of Proposed Rule Making.

15. NBC contended that the current FM service is efficient and diverse. Quoting from the Spring 1980 Arbitron data, it stated that of the top 100 markets containing 71% of the population over 12 years of age, 88 markets contain 5 or more FM stations; and of the top 150 markets containing 77% of the population over 12 years of age, 123 markets contain 5 or more FM stations. A study performed by A.D. Ring & Associates ("A.D. Ring") was submitted to support the proposition that the proposals would not increase availability in larger markets. The study investigated potential FM stations under the proposed changes for 24 of the top 100 markets. It indicated that no additional FM stations were possible in any of the top 12 markets and only one was found in the top 15 markets. Of the 9 remaining markets studied (markets 16 to 96 at ten market intervals), it indicated that the proposed changes would result in no Class C or C1 stations, 4 Class B stations to 3 communities, 19 Class B1 stations to 7 communities, or 34 Class A stations to all 9 communities.[7] Because no additions would be possible in the highest demand markets (*i.e.*, the top 12), several parties claimed that the proposed changes served no useful purpose.

16. After reviewing the comments submitted in this proceeding, we believe that no more appropriate forum exists within which to comprehensively examine the public interest need for additional FM radio service and the rule changes necessary to bring it about. Every effort has been made to establish as complete a record as possible and to encourage widespread public and industry involvement. We expanded the purview of the Advisory Committee to include the FM

[7] Presumably, some combination of Classes A, B1, and B stations is possible in most of the communities. However, this is unclear from the data submitted.

service, extensively delayed this proceeding by extending the comment period several times, and even accepted late-filed comments. The Commission believes the record before us is adequate to explore all pertinent issues. All matters addressed by the commenting parties (including those studies concerning new receiver characteristics, average distance separations, and audio listener tests and surveys) have been fully examined and factored into our decision. The need for additional outlets and the rule changes necessary to accommodate them have been carefully weighed against the effects such changes would have on the present FM service. We have concluded that the public interest is best served by adopting most of the rule changes proposed. There exists no reason to investigate further the desirability of modifying the rules, as many parties suggested, because such an investigation would only re-confirm what the record before us already indicates and would needlessly delay the benefits of additional FM station availability. Moreover, as subsequent discussion indicates, we have been keenly aware of the interrelationships of the AM and FM services in satisfying our statutory mandate to

> make such distributions of licenses, frequencies, hours of operation, and power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.[8]

17. When assigning radio broadcast stations, the Commission's basic objectives have been to provide

- at least one service to everyone,
- diversified service to as many persons as possible, and
- outlets for local expression addressing each community's needs and interests.[9]

We recognize that these goals can be self-contradictory; therefore it is necessary to strike compromises that both foster service to all and provide for outlets for local expression in as many communities as possible. Such compromises have been struck in the past, resulting in radio service in the United States to 98% of the population with at least one primary fulltime aural service (*i.e.*, one primary nighttime AM or one FM signal of 1 mV/m field strength or greater). *Further Notice of Proposed Rule Making*, Docket No. 20642, at paragraph 53. The rule changes adopted herein will foster the same goals,

[8] Section 307(b) of the Communications Act of 1934, as amended; 47 U.S.C. §307(b).

[9] The Commission recently simplified its FM allotment priorities and reaffirmed these goals for this broadcast service. New FM channels are to be allotted: first, where they will provide a first fulltime aural service; second, where they will provide a second fulltime aural service or a first local service; and third, where they are necessary to meet other public interest matters. (See the *Report and Order* in BC Docket No. 80–130, reconsideration pending, adopted on May 20, 1982.) Those comments seeking a re-examination of the FM priorities have been satisfied by Commission action in BC Docket No. 80–130.

providing opportunities for new local outlets while preserving existing primary service areas.

18. Some of the comments stated that demand for assignments does not represent the necessary Commission finding that such assignments are "in the public interest." Demand, however, does represent an applicant's judgement of a community's interest in and potential financial backing for a new station. We regard this as a fair basis on which to examine the public interest aspects of new proposals. As a practical matter, if a community really has little potential for establishing an additional station, we believe it unlikely that applicants or investors would be willing to extend the effort or financial backing that is required. As a second matter, potential competition should not be curtailed by the Commission second guessing a market's potential. Other comments claimed that increased competition could result in disservice to the public by reducing existing programming services. Our experience is that the public generally benefits from program diversity brought about by increased competition. In an individual situation, however, based on an application and appropriate pleadings, the Commission may be called upon to evaluate the overall adverse impact on service that could result from the institution of a new service in a community. See, *e.g.*, *Carroll Broadcasting v. FCC*, 258 F.2d 440 (D.C. Cir. 1958).

19. We also believe there is ample evidence to support the need for more FM stations. The Station Requirement List, submitted to the Region 2 Conference on AM Broadcasting, represents approximately 3,000 separate locations where the Commission foresaw a potential need or demand for nearly 4,000 additional radio stations in the immediate future.[10] The importance of the list for this

[10] The Commission notified this list to the International Frequency Registration Board (IFRB) to insure international protection of our future radio needs. The list of potential station requirements for various countries in the Western Hemisphere was submitted to the Second Session of the Administrative Conference on AM Broadcasting in Region 2 held in November and December, 1981, to establish future planning needs. Although time did not allow adoption of all these requirements, provisions were made for adding them after the conference. (See *List of Requirements Concerning Stations to be Authorized between 1 January 1983 and 31 December 1987*; Appendix to Document No. 19-E, 16 October 1981.)

This inventory of potential interest or demand for additional fulltime radio stations was compiled from lists of:

a) locations of all daytime-only AM stations;

b) cities asserted as needing minority-owned or public radio stations as defined by National Black Media Coalition and National Public Radio in the *Report on New Station Demand and Viability* as submitted by the Advisory Committee on December 17, 1980;

c) a few places where declarations of interest were filed in response to BC Docket No. 79–164 (the 9 kHz proceeding); and

proceeding is not the specific communities noted but the magnitude of the communities identified as being underserved. More than half of these assignments are in communities with no local AM or FM assignments, no local nighttime service, or are for additional minority-owned or local public radio stations. The Commission's studies have shown that additional AM stations possible as a result of our clear channel actions could only satisfy about 125 of these needs.

20. The A.D. Ring study on the availability of new allotments assumed that demand for new assignments exists only in the larger communities already having assignments. Nowhere in the *Notice* did we imply that the top 100 markets (sampled by A.D. Ring) represent the most serious cases of need. In this regard, the Commission undertook an extensive computer analysis of 200 entries from the Station Requirements List that had no local radio outlets, contained only daytime AM stations, or were asserted as needing additional minority-owned or public radio stations. Our study found that the existing FM allotment rules would allow a total of 57 new stations at 15 of 200 locations studied (see Table I of Appendix B). In other words, 7% of the locations studied could have at least one new FM outlet under the existing rules. For the various proposals under consideration, the studies indicated that the availability of at least one new outlet per location ranged from 41% to 61% of the study locations depending on which modifications are adopted. Thus, the potential of each of the Commission's individual proposals to satisfy the need for additional FM stations can readily be seen.[11]

21. To determine if these results were indicative of availability at a larger number of communities, the Commission conducted another examination using 1000 entries. This study indicated that our earlier findings were conservative. It also showed that under the rules being adopted, additions could be made to approximately: 49% of the communities studied that have daytime AM stations only; 31% of the communities studied that have no local assignments; 40% of the communities studied that were asserted as requiring additional minority-owned stations; and 26% of the communities studied that were asserted as requiring additional public radio

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d) communities of at least 2,500 persons which have no local AM or FM assignments and are located more than 10 miles from cities of at least 25,000 persons (compiled by the staff).

The Commission has made extensive use of this list for international negotiations as well as to evaluate AM service availability for the 9 kHz proceeding.

[11] For convenience, a summary of the studies and number of additions possible for each alternative is listed in Appendix B. Further explanation of these studies, their definition and limitations, can be found in a report entitled "Computer Project for BC Docket No. 80–90 (Increased FM Availability)", May 13, 1982, that has been placed in the docket file.

assignments that cannot be accommodated in the reserved portion of the FM band (82-92 MHz).[12]

22. Other indications of unsatisfied demand for additional FM service may be found in the comments of more than 35 parties who supported the proposals in this proceeding. Although the *Notice* specifically requested that commenters not submit requests for new FM allotments, approximately half indicated that additional FM stations needed in their communities were not available without the changes proposed. We also note that we receive approximately 200 petitions annually to amend the FM Table of Assignments, and that approximately 60% of the new assignments have two or more competing applications submitted.

23. In sum, we are persuaded that there exists a substantial demand for new FM service that cannot be satisfied under existing rules. We are persuaded further that the rule changes adopted herein provide the most efficacious means of accommodating that demand.

Technical Matters

24. Technical oppositions to the proposals in the *Notice* generally alleged that few stations operate with maximum facilities at minimum spacing. Therefore, stations are covering larger areas with a higher quality service than would be expected under the present rules.

25. The proposals contained in the *Notice* were, with one exception, based on the same technical assumptions as the allotment and assignment rules adopted in 1963. These rules consider interference protection to be determined solely by the separation, power, and antenna height limitations. They do not recognize concepts such as protected and interfering contours for individual stations. The distance separations provide protection from co-channel and first adjacent channel interference within a "primary" service range.[13]

[12] The difference in availability between the existing rules and the modifications adopted herein is shown in * Appendix B, Figures 1 and 2. These figures show the approximate distribution of additions for 1000 study locations throughout the contiguous United States. Every asterisk or star on Figure 1 indicates an approximate location (with respect to referenced communities) where an additional FM station may be added under the existing rules. Figure 2 indicates the possible station locations under the new rules adopted today, assuming all existing stations elect to increase facilities to avoid being reclassified.

[13] When originally adopted in 1963, the minimum separations were based on the existing FM propagation curves. These curves are not expected to predict service or interference at any particular location at any one time. However, they are useful for predicting service on a large area basis and therefore are used to analyze general assignment questions. Thus, the predicted service area of a class of station is indicated by the propagation curves for the generalized situation and may, or may not, reflect the actual service provided by a given station. For this reason, the rules state that the only protection to which a station is entitled is

At that time, the Commission decided that service ranges of 15 miles for Class A stations, 40 miles for Class B stations, and 65 miles for Class C stations would provide reasonably adequate service areas while permitting a sufficient number of FM assignments to be made.[14] Assuming that stations operate with maximum facilities, the minimum co-channel separations yielded protection of the 0.927 mV/m contour for Class A, 0.562 mV/m for Class B, and 0.944 mV/m for Class C stations. The *Notice* proposed separations that would have protected the 1.0 mV/m contour for all classes of stations; in other words it retained the approximate service areas of the Class A and Class C stations but reduced it for Class B stations.

26. In response, the comments claimed service far beyond these contours and noted that the present FM allotment rules result in an interference-limited service. That is, the predicted *interference-free* service areas are generally greater than those anticipated by the minimum separation requirements because few, if any, stations are limited in every direction by co-channel and adjacent channel stations operating with maximum facilities at minimum spacings. Several parties claimed that a signal at the 0.05 mV/m (34 dBu) level may be received. ABC noted that calculations provided by A.D. Ring indicated that a field strength of 0.063 mV/m (36 dBu) will permit satisfactory stereophonic service (in the absence of interference) while good monophonic reception is possible with a field strength of only 0.0056 mV/m (15 dBu). Still other parties noted that the CCIR, the International Radio Consultative Committee, recommends .25 mV/m (48 dBu) for general planning purposes.

27. Metromedia, Cox, Multimedia, and NBC submitted detailed showings of what they considered the interference-free service contours of their stations. ABC stated that an examination of their 7 owned and operated stations revealed that their existing interference-free service areas were greater than the area recognized by the minimum distance requirements. Metromedia submitted studies claiming the interference-free service offered by three of its stations would be reduced by 28, 37, and 43% of their geographic service areas if the proposals suggested in the *Notice* were adopted. Similar NBC studies indicated population losses for its stations of between 4.8 and 33% if their interference-free service areas were restricted by the proposals. It further noted that those losing service would not have it replaced by the new stations. NBC claimed that locations between 33 and 60 miles from New York City would lose most, if not

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that provided by the distance separation requirements, not the predicted service area indicated by the propagation curves (see Section 73.209 of the Rules). We are not changing this concept in this proceeding.

[14] The propagation curves in use in 1963 predicted a 65 mile service range for Class C stations. Those curves were refined in 1975 (53 FCC 2d 855), and the new curves indicate that the 180 mile co-channel separation figure yields a 57 mile service range as indicated at paragraph 4, *supra*.

all, of the New York City service. Thus, it concluded, the suburban and rural populations surrounding the larger cities would suffer the greatest losses. Cox and Multimedia also claimed that the only practical way of serving many suburban areas is with wide-area metropolitan stations.

28. Another A.D. Ring study submitted by ABC claimed a net loss in service would result from the Commission's proposals. It contained several theoretical assignment situations where new stations were interjected into certain currently permitted station groupings. All additions resulted in a net loss of service area.[15] It claimed this proved that any increases in FM availability would be to the detriment of present listening audiences.

29. NTIA, in reply, argued that stations should only be protected to "a primary service area" and service beyond that limit is properly considered secondary or unprotected. It also argued that the A.D. Ring study did not consider several factors, including the use of directional receiving antennas in rural areas (which would reduce the level of the interfering signal), the capture effect of FM receivers to distinguish the desired signal from the weaker undesired co-channel signal (which would reduce the large areas of degraded audio quality)[16], and the population densities in the interference zone (which should be much smaller than those near new community outlets).

30. Upon review of these comments, we note that the Commission recognized in 1963 that certain amounts of potential interference-free service had to be discounted if a sufficient number of assignments were to be made. Thus, we adopted mileage separations which struck a balance between the size of a station's contemplated service area and the number of stations that could be authorized throughout the country. Our experience since then has indicated that the balance was not incorrectly determined. From 1,100 commercial FM stations in 1963, we now have 3,800, and the demand for new FM stations is evident by the number of new channel

[15] The evaluations indicated a net loss in service area of:

(a) 2,075 square miles if a Class B station were located at the center of 4 Class B stations located at the four corners of a square 170 miles on a side;

(b) 563 square miles if a Class B1 station were located at the center of 4 Class B stations located at the four corners of a square 153 miles on a side;

(c) 1,695 square miles if a Class B station were located at the tip of a triangle 120 miles from 2 Class B stations that are 170 miles from each other; and,

(d) 2,649 square miles if a Class B1 station were located at the tip of a triangle 108 miles from 2 Class B stations that are 153 miles from each other.

[16] Reception of one of two co-channel FM signals of nearly equal strengths is possible because FM receivers are capable of responding to the stronger of the two signals. AM receivers provide mixed reception in these cases.

allotments requested every year and the instances of competing applications for available channels.

31. We recognize that the introduction of new stations into the current scheme could cause interference to the reception of existing stations beyond their normally contemplated service areas. Indeed, this is the case under present rules where the Commission regularly receives letters complaining of lost FM service (outside the primary service area) when a new station is activated or an existing station modifies its facilties. Proposed rule changes that would permit additional new stations would similarly create losses of secondary services. The opponents of the rule changes, however, have failed to provide any information that the populations allegedly losing such extended services exceed the population gains from new stations.[17] We believe that these losses are more than compensated for by the provision of new services, particularly to communities without local service. In this regard, we note that 98% of the population of the United States currently receives at least one fulltime primary aural service. The new stations contemplated herein would not adversely affect that primary service, but they would provide local service (or local fulltime service) to communities that are precluded under current rules. In this manner, the percentage of the population enjoying primary aural service and the number of communities with local stations may be increased. On balance, therefore, we believe that the provision of new primary service and first and/or second local service is a higher priority than the preservation of service beyond the normally protected service area of existing stations. This is particularly the case where that extended service may be adversely affected under current rules if: the providing station changes its location; a limiting station is authorized under current distance separation requirements; or an existing limiting station changes or increases its facilities within current restrictions. Accordingly, we do not believe it appropriate to protect these extended service areas at the expense of new primary service.

32. Some commenters also alleged that the present minimum separation requirements result in a low quality signal at the outer edge of a station's primary service range. They noted that while the original protection ratios are satisfactory for regular FM broadcast operations, they are unable to protect multiplexed operations

[17] The previously referenced theoretical A. D. Ring study is limited to *areas* of alleged loss of service only. It, therefore, could not provide information on the population within those areas, the population that would receive primary service from the presumed new station, or the other services available in the asserted "loss" area. The interference-free service areas that Cox and Multimedia claimed for their stations, however, each contain between 17 and 34 FM stations located either within or directly along the claimed service contours of each station. Between 7 and 14 of these locally assigned FM stations are located within the areas they claim will lose service (except for Station WAIA, Miami, Florida, where the interference-free service is mostly over swamp land).

(stereophonic broadcasting and subsidiary communications operations). The comments urged sufficient protection of the service contour to permit "satisfactory" reception of these operations at the full extent of their service range.

33. In support of this argument, these comments called attention to the international standard for stereophonic reception which is based on a 50 dB audio frequency ("AF") signal to noise ("S/N") ratio. (The international standard is contained in the recommendations of the CCIR.) To provide for this level of quality, they argued that the distance separation requirements should be increased to provide higher radio frequency ("RF") desired to undesired ("D/U") signal protection ratios.[18] The Technical Subgroup Report summarized several recent studies and submitted curves indicating the effect of various distance separations on co-channel protection ratios for a desired 1 mV/m (60 dBu) signal.[19] This report and several comments noted that the NRSC Report concluded that reception of a signal yielding a 50 dB AF S/N ratio in the stereophonic mode requires RF D/U protection ratios of 40 dB for co-channel, 25 dB for first adjacent channel, and -20 dB for second adjacent channel stations.

34. Also, Group W alleged that FM subcarrier services could not be provided effectively if stations operated at minimum separation distances. They stated that any modifications which would decrease current protection could significantly reduce the quality of subcarrier services. The SCA Study, submitted by the Advisory Committee, echoed this argument and noted that further investigations should be performed.

35. Although the Commission was aware of the fact that some FM stations were providing stereo service in 1963 when it first addressed this issue in Docket No. 14185, and that such service required greater protection for high quality reception, it did not select separations to protect stereo service to the limit of the

[18] The Advisory Committee, urging protection of stereophonic service, submitted three studies dealing with this topic: the Stereo Listening Study; the Subjective Audio Study; and the Mileage Separations Study. These studies indicated that (1) approximately one-half of all radio receivers are capable of stereophonic reception, with stereophonic listening about twice as common as monophonic listening; (2) a 50 dB AF S/N ratio was necessary for satisfactory stereophonic reception (if the presence of the interfering signal was to be only "slightly annoying" according to a panel of expert listerners); and (3) the average co-channel separation between stations yields a 34 to 40 dB RF D/U signal protection ratio.

[19] The reports concerning protection standards are: *Report to the National Radio Systems Committee from the FM Subcommittee Task Force*, July 24, 1981; *Report of the National Quadraphonic Radio Committee to the Federal Communications Commission*, November 1975; *Recommendations and Reports of the CCIR*, 1978; and *A Study into Current FM Receiver Performance and the Relevance of FM Allocation Criteria*, Peter Cahn and Associates, April 1978.

otherwise contemplated service radius. The requests to increase protection ratios were rejected based on the need to provide for a sufficient number of necessary assignments and because stereophonic broadcasts were considered to be an optional enhancement of a station's entertainment programming.

36. Nonetheless, the Commission re-examined the desirability of requiring such protection in response to the comments received in this proceeding. We used the NRSC receiver data to determine the expected service ranges under the present rules for monophonic and stereophonic reception of signals having different qualities. A 30 dB AF S/N ratio was used to represent the "standard quality" monophonic service now provided by the separation requirements. (This figure generally is assumed to form the basis for present protection ratios although, in Docket No. 14185, the Commission did not acknowledge it as such.) A 50 dB AF S/N ratio was used to represent the "high quality" stereophonic service referenced by the comments. We developed the following table based on a receiver having the performance characteristics obtained by averaging the data contained in the NRSC report (assuming co-channel stations operating at minimum distance separations with maximum facilities):

Type of Reception	*AF S/N Ratios*	*RF D/U Ratios*	*Predicted Primary Service Area (miles)*		
			Class A	*Class B*	*Class C*
mono	30 dB	14 dB	19.4	47.5	63.5
stereo	30	*20	16.6	41.5	57.1
mono	50	35	7.9	27.1	41.3
stereo	50	40	6.2	22.6	36.1

*RF D/U ratio used to determine present co-channel separation distances.

Thus, the present co-channel Class C separation requirement of 180 miles permits "standard quality" monophonic reception at a distance of approximately 63 miles while "high quality" stereophonic reception is expected to a range of 36 miles. All minimum separations provide for an "inner ring" of high quality stereophonic service which gradually diminishes to standard quality monophonic service at the limit of the primary service range in the direction of the undesired station.

37. To provide stations with the 40 dB RF D/U protection necessary to achieve a 50 dB AF S/N ratio, however, would require the separation between co-channel Class C stations to be increased from 180 miles to 255 miles. Such an increase amounts to a Class C station's signal experiencing 20 dB RF D/U protection at a distance of 82 miles from the transmitter rather than 57 miles as currently expected. In other words, protection that results in 50 dB AF S/N stereophonic service simply extends a station's monophonic service range. If the new distance separations were the only ones based on the higher protection levels, the new station classes would require distances as great, or almost as great, as the present requirements

for the larger classes. For example, for a new Class C1 station to offer a minimal 34 dB RF protection level, it would have to be located at least 217 miles from an existing co-channel Class C station (while a new Class C would only have to be separated from an existing Class C station by 180 miles). Analysis of the adjacent channels yields analogous results.

38. To require protection at such levels would effectively preclude many new assignments. Even if this proceeding were broad enough to determine a minumum level for predicted stereo service, we do not believe that protection of that service beyond what was contemplated in 1963 would be appropriate. As we found 20 years ago, such protection would significantly increase the necessary separation between relevant channels and thereby substantially decrease the potential for new stations. We believe that the balance as originally struck provides adequate service areas to potentially support a station's operation while giving opportunities to create enough stations to provide a fair, equitable, and efficient distribution of radio service among the several States and communities. See 47 USC 307(b) (1936)

39. We recognize that permitting Class A stations on Class B/C channels and the intermediate classes of stations provide additional opportunities for the creation of stations that may have a limiting effect on the stereo service areas enjoyed by existing stations by virtue of their location at distances exceeding the minimums established in the rules. However, we believe that the potential gains of new service, consistent with the mandate of Section 307(b), far outweigh the losses of enhanced (stereophonic) service predicted by the commenting parties since protection was not afforded the affected areas under the existing rules. In making this judgment, we emphasize that such areas will continue to get the same protection for monaural service as was originally comtemplated in 1963. That is to say, the balance is between new service and enhanced (stereophonic) service, and we find no compelling reason to increase previously granted protections at the expense of needed new service to communities that would otherwise be precluded from getting a new FM service.

40. In this regard, we again emphasize that the communities we have identified as potential locations for new FM assignments under these rules include a substantial percentage of places with no local service or with only daytime AM service where existing rules would not permit a new FM station. We believe that provision of such service outweighs a predicted loss of multiplex services that may already be severely curtailed by existing co- and adjacent channel stations.

41. The requests to increase the protection ratios on which the separations are based are directly related to the arguments concerning service beyond the theoretical protected contour. Parties have

argued that we should protect a station's stereophonic service to what had been the limit of its normally contemplated service radius. They assert that most stations are located at more than the minimum mileage required by our rules and such stations therefore receive stereophonic protection beyond what could be expected at the minimum distance. We do not doubt that this is the case. Our mileage requirements are *minimums* and have never been waived at the allotment stage. Moreover, persons seeking new FM stations desire to serve specific communities. That fact along with the minimum mileage requirement would result in a location at some greater distance in almost all cases. If the service areas were determined solely by the distance to co-channel stations, there would be many cases where an FM station provided monaural and stereophonic service to a significantly larger area than that contemplated by the co-channel separation figures. However, in many cases, limiting stations are those on adjacent channels.[20]

42. Finding that a station's predicted stereo service area is limited by co-channel and adjacent channel stations does not mean that stereo service is unavailable in these areas or that the "losses" are irreversible. In fact, the new receiver data contained in the NRSC report indicates that the 20 dB RF D/U ratio provides for stereophonic reception, if possibly of lesser quality than some parties believe appropriate, and not just monophonic reception as previously thought by the Commission and many parties. Several parties used present protection ratios to claim that their service is being listened to and *enjoyed* at the outer edge of their interference-free contours. Therefore, the arguments suggesting that the signal quality at the present protection level is "unlistenable" appear highly exaggerated. Even the listening tests and surveys indicated only that a 30 dB AF S/N ratio was "annoying" for the "preferred" stereophonic reception mode. As an alternative to higher protection ratios, persons receiving service of inferior quality may easily improve it by installing a directional receiving antenna or improving the performance capability of their receiver. In this manner, persons residing in areas predicted to "lose" service may regain it if they so desire.

43. Several parties also stated that the Commission should protect a station's service range from second and third adjacent channel interference, rather than basing these separations on substitution of signals.[21] Finally, many parties asserted that mobile

[20] For example, the stereo service area of station WPGC, Morningside, Maryland is limited by a single co-channel station (WJAC-FM, Johnstown, Pennsylvania) and three adjacent channel stations (WFLO-FM, Farmville, Virginia; WFTR-FM, Front Royal, Virginia; and WFLN-FM, Philadelphia, Pennsylvania).

[21] Replacement service assumes that the service of one station will supplant, not simply interfere with, the service of another station. Using this concept, new stations must locate outside the predicted service area of stations 2 or 3 channels removed, and these stations must be outside the service area of the new station.

(*i.e.*, automobile radio) reception problems would be exacerbated if the distance separations set forth in the *Notice* were adopted.

44. ABES and ABC both argued that the second and third adjacent channel separation requirements should recognize the same service area as the co-channel and first adjacent channel separation standards. Not doing so is a direct cause of mobile FM receivers randomly capturing undesired stations. ABES also claimed that tuning in the "educational band" (where the primary service range is given full second and third adjacent channel protection) is comparatively easy versus tuning in the "commercial band" (where the replacement service concept permits closer spacing of stations). It claimed that this difference illustrates the appropriateness of protecting the primary service contour rather than using the replacement service concept. As an example of tuning difficulties, ABES noted mobile reception problems in the Washington-Baltimore area where 56 stations are assigned in the "commercial" portion of the FM band. ABES recommended that *full* protection from second and third adjacent channel interference be afforded to each station's primary service range. ABC and AGK suggested that a compromise "guardband" solution be adopted if full second and third adjacent channel protection standards were unacceptable. Their guardband compromise was to base the distance separation requirements on a -40 dB RF D/U ratio for both second and third adjacent channel separations.[22]

45. NTIA, on the other hand, found only minor interference problems with seven Los Angeles area FM stations that have second and third adjacent operations at less than minimum separations. The data did not address whether the public is experiencing reception problems, except to note that "several station managers knew of no interference problems." NAB, in reply, claimed that the resulting minor interference areas would not be typical because the receiver data referenced more expensive receivers than the average ones used by the public.

46. We recognize that some environments cause FM receivers, particularly mobile receivers, difficulty in maintaining suitable signal strengths to avoid second and third adjacent channel interference. Mobile receivers were not a major planning factor in the present separation requirements or those proposed in the *Notice*. Rather, we used the concept of replacement service. Mobile receivers, however, are subjected to wide variations in signal strength due to multipath reflections as they pass through different environments along highways. In these situations, they are likely to "lock onto" stronger adjacent channel signals rather than the desired signal. The Commission believes that the separation distances can be

[22] This is the third adjacent channel protection standard required in the educational portion of the FM band (88–92 MHz). See Section 73.509 of the Rules.

modified to reduce mobile reception problems and only minimally affect the potential for additional FM stations. Thus, the rules we are adopting provide "guardband" protection on second and third adjacent channels as suggested by ABC and AGK.[23]

47. Finally, several parties urged consideration of additional FM stations on a case-by-case basis, including consideration of directional antennas and terrain.[24] Cox/Multimedia, however, argued that a protected contour scheme risks engulfing the FM service with the interference and processing problems of the AM broadcast service. In any case, the Commission is not convinced that the benefits of the Table (*i.e.*, ease of comparing community needs, provision for future facility growth, and simplicity of processing procedures) should be abandoned at the present time. Even with the changes adopted herein, many, if not most, existing stations will be provided the opportunity for future growth. Although some parties indicated a preference for the "AM-type" method, this method is too time-consuming to comport with the Commission's goals to facilitate faster processing procedures. The changes adopted herein should provide the opportunity to establish additional radio stations in areas of greatest demand that should not be delayed by case-by-case processing procedures. A go/no-go method as represented by minimum distance requirements still is advantageous and preferred.

Specific proposals

48. Before turning to a discussion of each proposed change, it may be helpful to reiterate the results of the Commission's computer studies on the potential benefits of those changes. Using 200 locations identified as needing additional radio services, the studies determined how many of these could have an allotment under the existing rules and each proposed rule change separately. The resulting progression demonstrates the incremental increase in availability, *i.e.*, the percentage of locations for which at least one new allotment was found, for the individual proposals. (The benefits of each option are set forth in more detail in the individual discussion of each proposed change and in Appendix B.)

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[23] Also, the NRSC Report indicated that the second adjacent channel interfering signal can be 50 dB greater than the desired signal (-50 dB RF D/U) and still provide a 30 dB AF S/N stereophonic output signal. Thus, the -40 dB RF D/U ratio appears generous for distance separation requirements based on a monophonic reception standard.

[24] Although the use of directional antennas, terrain shielding, and co-location of transmitters were not proposed in this proceeding, the Commission did request additional information. We sought guidance on how these methods might be incorporated into our present Table structure. A variety of information on increasing FM availability and the potential problems of employing these techniques were submitted. Specific suggestions related to preservation of the Table were not provided.

Options	*Availability*
1. Existing rules	7%
2. Class A stations on Class B/C channels	41%
3. Class B stations in Zone II	41%
4. Additional station classes B1, C2, and C1	43%
5. Uniform protected contour	55%
6. Reclassification (with Option 5)	61%
(without Option 5)	57%

49. *Option 2, Class A Stations on Class B/C Channels.* This proposal was opposed by ABC, NBC, and others who suggested that, although it could result in new assignments in areas outside the larger radio markets (*i.e.*, outside the top 12 markets), this service would represent an inefficient use of channels reserved for the wider area stations.[25] NTIA, on the other hand, suggested that reserving certain channels for Class A use should be eliminated altogether. They argued that any class of station should be allowed to operate on any channel. NAB, in reply comments, argued that this idea would be contrary to the basic principle of the Table which ensures stations for smaller sized markets.

50. Several parties claimed, and our studies confirmed, that this proposal would provide the single largest increase in availability for most locations. Our study of 200 locations found that availability of at least one new station per location would increase from 7% under the present rules to 41% if this proposal were adopted. Many argued that these outlets would be a new source of interference outside the primary service range of existing stations. As stated previously, however, the Commission believes that the opportunity to establish additional stations should not be curtailed by providing protection to secondary service areas. Therefore, we will allow Class A stations to operate on all channels.

51. NTIA also proposed that Class B and Class C stations be allowed to operate on Class A channels. However, that change should offer few potential assignments, and those that are possible would preclude large areas from future Class A allotments. Therefore, at this time we will allow Class A operations on any channel, but other station classes will not be permitted to operate on the Class A channels.

52. The *Notice* further suggested that Class A stations be permitted to occupy a Class B/C channel only if a Class A channel were not available. No specific comments addressed this proposed restriction. The Commission, however, is concerned that defining

[25] These parties also argued that adoption of this proposal would result in some Class A stations operating at a competitive disadvantage to higher power stations. This issue was addressed in BC Docket No. 80–130. The Commission found there that intermixture of different classes of stations within the same community should not be foreclosed as a matter of general policy. In any case, the issue now before us is not whether different classes of stations may be intermixed in the same market but whether Class A stations should occupy Class B/C channels.

availability (*i.e.*, reasonable site, city grade coverage, co-location with AM transmitter, antenna farms, etc.) would be difficult. Therefore, we have decided not to adopt this restriction because it would require extensive showings and would be administratively cumbersome to enforce. We believe the applicant to be the best judge of its particular situation and accordingly shall not restrict its choice. Likewise, we will not require these channels to be used by the larger class of station first, as some parties urged. To do so might be counterproductive to the establishment of a local station if a potential applicant lacked the financial resources to construct and operate the larger class of station.

53. *Options 3 and 4, Intermediate Classes of Stations.* The *Notice* proposed creating two new classes of stations: Class B1 with facilities between Classes A and B and Class C1 with facilities between Classes B and C. It also suggested allowing Class B stations to operate nationwide. Thus, three classes of stations (Classes A, B1, and B) would be permitted in Zones I and I-A and all five classes (Classes A, B1, B, C1, and C) in Zone II.

54. Most comments did not focus on allowing Class B stations in Zone II independently of the other proposals. As pointed out in the *Notice*, simply allowing Class B stations to operate in Zone II would not allow many additional assignments unless the distance separations were changed.[26] [The FCC computer studies confirmed that no increase in availability was possible (Option 3 compared to Option 2) and only 12 of the Class A stations from Option 2 could become Class B stations (see Table II of Appendix B).] Consequently, the *Notice* proposed to reduce the protected contour of all Class B stations from 0.5 mV/m to 1.0 mV/m.

55. As for the creation of the proposed Class B1 and Class C1 stations, ABC claimed that the A.D. Ring studies proved they would not be beneficial to the public. It noted that no Class C1 stations could be identified and the Class B1 stations that were found would cause interference to existing services over geographic areas that would exceed the gains from the new services. ABES noted that additional classes of stations could be supported if variations of the *Notice's* proposals that would provide adequate protection to existing stations were adopted. Specific modifications were not suggested, however, except to urge protection of existing *interference-free* service areas. NTIA again urged an even greater number of station classes. It argued that the distribution of service areas for existing Class B and Class C stations would be more uniform if seven rather than five classes were adopted. In reply, Cox/Multimedia claimed that NTIA's proposal for seven classes does not contain any detailed

[26] This occurs because the existing rules require Class B stations to be separated from co-channel Class C stations by 170 miles, or only 10 miles less than the co-channel Class C to C requirement of 180 miles.

technical analysis but merely an assumption that "if five classes of channels are efficient, seven would be even more efficient." They argued that NTIA failed to address the effects of tighter constraints on station growth, licensee costs, greater levels of predictable interference, and administrative impact.

56. Although NTIA's seven class proposal may represent more uniform statistical distribution of existing stations, this is a benefit of little value and great cost. An analysis of its proposal indicated only slight differences between co-channel separation requirements for different classes of stations. For example, NTIA's Class C1 station would be separated from a Class C station by 160 miles, while a Class B station would be separated from the same Class C station by only 156 miles, a difference of only 4 miles. These separations would not allow stations sufficient room for facility growth or adequate transmitter site selection. It also would be administratively cumbersome for the Commission to oversee. While we believe additional station classes are desirable, a balance must be reached between complexity and the numbers of potential assignments. Therefore, we shall not adopt the classes proposed by NTIA.

57. The Commission explored the gains possible if stations with Class B facilities were assigned in Zone II and protected to the proposed 1 mV/m contour (*i.e.*, denoted as Class C2).[27] We also explored the proposal to create additional classes of stations so that existing stations would receive protection more in keeping with the service rendered. The FCC computer studies examined the number of assignments possible if three new classes (B1, C2, C1) of stations were added. Thus, separate classes were studied for the two zones: Classes A, B1, and B in Zones I and I-A and Classes A, C2, C1 and C in Zone II. These studies assumed protection of existing stations equal to that embodied in the present separation requirements. This option found that availability would only be 43%, compared to the 41% expected by permitting Class A stations to operate on Class B/C channels (Option 4 versus Option 2). However, the study also indicated that the stations assigned could operate with greater facilities. An additional 11 Class B1, 46 Class C2, and 16 Class C1 stations were found (see Table II of Appendix B).

58. Because the larger class of station represents improved efficiency in terms of service-rendered compared to interference-caused, the Commission is convinced that adopting these additional classes of stations would be beneficial.[28] We believe that allowing

[27] Since the Class B minimum separation requirements depend upon the zone of operation, stations operating with Class B facilities in Zone II will be termed Class C2 to avoid confusion with Class B facilities in Zone I.

[28] Efficiency according to Docket No. 14185 is defined as: Eff. = $363 \times (R/S)^2$, where R is the primary service radius of a station and S is the spacing between stations (see *Notice of Inquiry, Notice of Proposed Rule Making, and Memorandum*

stations with Class B facilities with modified separation requirements in Zone II (Class C2) and creating intermediate classes of stations (Classes B1 and C1) that serve larger areas than Class A stations represent major benefits in terms of spectrum efficiency.

59. *Option 5, Uniform Protected Contour (1 mV/m).* Several parties submitted detailed showings indicating that changing the minimum separation requirements to represent a uniform 1 mV/m protected service contour could severely limit a station's primary service range, especially that of Class B stations. Metromedia and various other parties pointed out that there were specific reasons for Class B stations currently being based on a 40 mile service range. They noted that, in 1963, the Commission found that the large metropolitan communities of the northeast averaged 33 to 40 miles in radius. They argued, therefore, that a minimum limit of 33 miles for Class B stations was totally unacceptable for many communities located in Zone I. ABES stated that such a reduction would be a 32% loss in primary service area for Class B stations and, in one particular case, a loss in population of 175,000 persons for each station located at Indianapolis, Indiana.

60. ABC and others argued that a 1 mV/m protected contour was previously considered and rejected in 1963 in Docket No. 14185. They noted than the Commission refused to create a squeezed-in service by "protecting only the 1 mV/m contour." Cox submitted that reducing the minimum spacing would create a system similar to the AM service and would waste FM's unique potential for wide-area service. ABC claimed that this proposal would not represent any appreciable increase in new FM assignments because only one addition in the A.D. Ring study was due to reduced separation requirements. Because the other proposals yielded greater numbers of potential FM additions, it argued that the uniform protection proposal would not be instrumental in providing for additional FM assignments in needy areas. NTIA in reply claimed that both Class A and Class C stations "have done well" with a 1 mV/m protected contour and suggested that Class B stations "should be able to also." They argued that a decrease in separations would allow new stations at intermediate distances.

61. ABES focused on the impact of the protection of mobile receivers and submitted detailed analyses of several situations in the northeast where several stations are spaced less than the minimum separation requirements. It claimed that the resulting protection of only the 1 mV/m contour in these cases has made matters so severe as to render many signals "unlistenable." Consequently, reducing the minimum separation requirements would result in similar areas where only garbled signals could be received. Because more cities

Opinion and Order at paragraph 39). Thus, the efficiency of co-channel Class C1 stations is 32%, while co-channel Class A stations are only 19% efficient.

have acquired "New York City-like" architecture that causes increased signal reflection and diffraction since the present distance separations were developed, it suggested the Commission avoid any action that would increase interference to these receivers. ABES stated that in today's environment (*i.e.*, tree-lined highways, bridge abutments, super-highway signs, downtown buildings, etc.), "[t]he desired signal is subject to very rapid changes in level, beyond the ability of the receiver signal "leveling" or automatic volume control to avoid." It further cited cases in New York City, Philadelphia, and along the U. S. Route 1 corridor where co-channel and first adjacent channel stations located at less than minimum spacings have resulted in many cases of "limited coverage within myriads of interference." Thus, ABES argued that greater protection is needed and the distance separations should not be decreased.

62. The Commission recognized in the *Notice* that this proposal would have a substantial impact on the primary service area of existing Class B stations. Because the present separation requirements for Class A and Class C stations afford protection to approximately the 1 mV/m contour (at .912 and 1.023 mV/m, respectively, using current propagation curves), they are, for the most part, unaffected by the proposed change. For the Class B station, however, this proposal would reflect a change from the .524 mV/m to the 1.0 mV/m field strength contours or a decrease in primary service range from 40 miles to 33 miles. The *Notice*, however, questioned whether the increases in availability justified reducing the Class B stations' primary service area. The majority of the commenting parties, citing the A.D. Ring study statistic of only 1 addition, argued the negative. The FCC computer studies, on the other hand, revealed that availability would increase from 43% (Option 4) to 55% with this proposal. Thus, 110 of the 200 study locations would be provided an opportunity for additional outlets instead of 86 (see Table I of Appendix B). Also, the number of stations allowed at these communities would increase from 235 to 332. This new availability, unlike the other proposals under consideration, would be at the expense of the primary service areas of existing stations. In view of this impact and because urbanized areas have grown since 1963, the argument against this proposal is most compelling. The Commission does not consider the incremental increase in availability to justify the loss of existing primary service areas. Again, balancing the total number of potential stations against the potential service rendered, we cannot justify reducing a station's expected service area at this time.[29]

63. *Option 6, Reclassification of Existing Stations.* The *Notice*

[29] As noted in comments submitted by Bob Zwick, the Commission is aware that the 1 mV/m contour may be located at a distance of 40 miles by allowing an increase in facilities for Class B stations. However, this suggestion would not foster the goal of increasing the availability of FM stations.

further proposed to reclassify all existing stations, after a period of three years, according to their actual operating facilities. The Commission noted that many existing stations are operating substantially below the maximum facilities permitted. Because the minimum separation requirements assume maximum facilities, these stations preclude other FM stations from being authorized, yet do not furnish primary service over the area intended. The three year period was suggested to give each station the opportunity to explore its ability to increase facilities and submit an application for modification of its license.

64. NBC suggested that reclassification of stations where the need for mutual protection could be demonstrated should not occur. They argued that if existing stations chose to operate below minimum facilities, the new assignment "should protect all existing service areas." Metromedia did not technically oppose reclassification stating that ". . . it was a more reasonable approach than reduced distance requirements of providing increased service to the less populated areas in the West." Cox and several others, however, opposed this change, stating that part of FM's unique identity, which allows for future expansion, could be destroyed. They argued that existing licensees would be faced with an unappealing choice. They either would have to risk present economic investment to increase their facilities based on estimates of future community growth, or otherwise be foreclosed from realizing their full potential due to present circumstances. ABES and others noted that stations may not be operating with maximum facilities due not only to economic reasons, but for other reasons as well. They cited the Commission's multiple ownership restrictions (Section 73.240), FAA air hazard limitations, and local zoning restrictions as examples. Because many of these limitations restrict antenna heights, ABES suggested that stations be allowed to increase their power to attain the equivalence of operating with maximum effective radiated power (ERP) and antenna height above average terrain (HAAT).

65. The Commission realizes that many stations are operating at less than "full" facilities because of other Commission regulations, other government agencies' limitations, or restrictions of local jurisdictions. It is exactly this inconsistency, between the Commission providing for expansion when the possibility is virtually nonexistent, that we wish to rectify. Rather than viewing reclassification as discriminatory, the Commission believes that recognizing actual facility limitations is a realistic means of allowing for additional outlets. In fact, we view the preclusion of new stations from relatively underserved communities by stations operating substantially below maximum facilities as being the real case of discrimination. Additional FCC computer studies verified that availability of new FM stations could increase from 43% to 57% if reclassification were considered (see Table III of Appendix B). Because a station's

classification should reflect its potential, either by spacing requirements, economics, or government limitations, the Commission views reclassification as desirable.

66. The ABES' suggestion that stations unable to increase their antenna height be allowed to increase power to attain equivalence of a station operating at the maximum facilities was considered in Docket 14185 and rejected. The Commission stated ". . . an increase in power increases interference more than it does service. Therefore, we should obviously encourage improvement in service through greater antenna height rather than greater power, and affording an opportunity for power increase, without limit or at least to a greater extent, would work in the other direction." [*First Report and Order* at para. 79] Because this argument is true today, we must again reject this alternative.

67. *Time Permitted to Upgrade Facilities.* The *Notice* suggested that existing stations would be given three years to improve their facilities to the minimum for their class, before any reclassification took place. It further proposed that new Class C stations have a period of six years within which to reach minimum facilities before being reclassified. Since these two proposals consistently were confused, an explanation appears in order. The first period of 3 years would apply to *all existing* licenses, construction permits, or applications that were authorized, or on file, on the effective date of this order. Thus, one announced date would be used for evaluating the facilities of existing stations. The later proposal would continually be permitted when *future Class C* applications were authorized. Because the Class C stations would be the only class with a minimum antenna height requirement, this time would provide new Class C stations with an initial opportunity to obtain revenue before possibly constructing a large antenna tower.

68. The comments failed to provide any specific data that would support a deadline either longer or shorter than those proposed in the *Notice*. ABC argued that three years may be inadequate for licensees to reach any minimum operating requirements. They suggested that the Commission authorize liberal extensions of any deadlines. NTIA fully supported reclassification and submitted 24 months (2 years) as a more than adequate time for expansion. However, the reply comments of Cox/Multimedia urged that 2 years was an unrealistic time period to allow stations to make an application for a change in facilities. Several parties wished to have an unlimited time in which to effect the changes. Finally, the difference in the time permitted existing and future stations received no comment.

69. Lacking details, it is incumbent upon us to balance the public interest benefits of the new services possible after reclassification against the inconvenience to broadcasters. On balance, we believe that, for simplicity, a single date should apply to all instances. We

cannot allow an open-ended time period continually to frustrate the opportunity to establish the new stations. Nor do we intend to provide time that is inadequate to consider and submit applications for facilities equal to or greater than the minimum for a class of station. In this regard, we emphasize that licensees can protect their classification merely by filing an application to upgrade their facilities. It is not necessary that the application be granted or the construction be completed by the deadline date. Additionally, we expect that any group seriously contemplating a new Class C service station should have good economic support and be able to begin operations with the larger facilities. Specifying a different six year period for each new Class C authorization would create confusion and be administatively difficult to implement.

70. Based on a weighing of the benefits and inconveniences, and considering the delays in reaping the benefits of the other changes adopted herein, we will indicate a date three years from the effective date of this order by which *all* stations must apply for appropriate minimum facilities. After the 3 year time period for expansion has expired, a complete listing of the FM Table of Assignments will be published to indicate the new class designations that reflect the facilities authorized, or those for which an application has been filed.[30]

71. The Commission is also using the opportunity presented by this proceeding to modify its rules governing "major" and "minor" modifications of station authorizations. Currently, any modification that represents a change of 50%, or more, in the area within a station's predicted 1 mV/m field strength contour is considered a major modification of an authorized FM station. Because the distance separation requirements are based on using maximum facilities, we believe the procedure to increase facilities (that will be encouraged by adopting the reclassification proposal) could be greatly simplified. Therefore, we shall designate these changes as minor modifications.

Miscellaneous

72. *Preferences.* Many existing licensees of either Class A or short-spaced stations requested they be given preference in the assignment of any new channels which may become available. NPR and CPB also requested similar preferential treatment be afforded to

[30] The Commission does not consider reclassification as a modification of a station's license. Because the license authorizes only the station's actual facilities, it would not have to be altered in anyway. Reclassification is merely the re-designation of a station's potential status in a geographic table of channel reservations. Even if our action could be construed as a license modification, the record adduced in response to present *Notice* is entirely sufficient to explore licensees' concerns, and they would not be entitled to separate hearings based upon reclassification. See, *WBEN, Inc.* v. *U.S.*, 396 F.2d 601 (2nd Cir. 1968)

educational, noncommercial entities in either the allotment or the assignment process.[31] ABC supported establishing assignment priorities including favoring applicants that seek to convert daytime only AM stations to fulltime local outlets. Several licensees of short-spaced stations submitted detailed examples of how mutual interference problems have curtailed their primary service areas. They also requested preference in the use of any new allotment that could alleviate their present circumstances.

73. The Commission is not convinced that this proceeding is the best vehicle for considering preferences of this type. It has focused on FM allotment matters rather than questions of channel usage by a particular entity or group. We believe these questions are more appropriately considered in separate rule making proceedings focused on licensing policies rather than allotment rules. For example, we note that the outstanding *Notice of Inquiry and Notice of Proposed Rule Making* in BC Docket No. 82–538, has asked for comments on the desirability of providing licensees of daytime-only AM stations a preference for the use of any FM allotments that might become available in their communities. 47 Fed. Reg. 38937 (published September 3, 1982). We believe that preferences for daytime-only AM licensees, existing short-spaced FM licensees and other worthy groups are best resolved in proceedings specifically devoted to such matters.[32]

74. *Puerto Rico.* Portorican American Broadcasting Co. requested special consideration of the problems encountered in Puerto Rico because of terrain. It submitted a detailed explanation of the difficulties experienced trying to improve the facilites of its FM station WOQI, Ponce, Puerto Rico, by changing its transmitter site. It urged the Commission to allow flexibility for existing stations to improve their service before permitting additional outlets on the island.

75. The Commission again is reluctant to consider rule changes for individual situations. Instead, we prefer to account for any specific problems through the present processing methods. In reviewing Portorican's comments, we note that its request involves a waiver to locate at less than minimum spacings to existing FM stations on the island. Further, it urges grant of the waiver using calculations employed in the noncommercial, educational section of the rules (§ 73.509), which is based on protection of existing contours.

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[31] NPR specifically requested individual channels be reserved for future use in communities lacking adequate public radio service.

[32] We recognize that many licensees of existing stations, including AM daytime stations, will be interested in seeking the use of the new FM allotments that will be available as a result of this proceeding. In light of this interest, and in recognition of the valuable community service that these licensees have provided, we intend shortly to issue a Notice of Proposed Rule Making proposing procedural means to facilitate such improvements of existing service.

Inequities because of terrain in Puerto Rico were addressed in the *Fourth Report and Order* (Docket No. 14185) adopted in 1964 and again in a recent *Report and Order* (BC Docket No. 81–421). We prefer to continue this pattern and will address any particular problems that are unique to Puerto Rico in separate proceedings when needed.

76. *Aviation.* The Commission also had a request by ARINC and AOPA to recognize potential increases in interference to aeronautical navigation and communication services that are immediately adjacent to the FM broadcast band at 108–136 MHz.[33] AOPA noted that according to its surveys 43 locations currently experience interference and "innumerable" other cases have had to be rectified through reassignment of aeronautical frequencies. Both argued that the proposals set forth in the *Notice*, except for Class A additions, would have an adverse impact on aviation. They and the FAA also expressed concern over the encouragement of tall antenna towers, especially of Class C stations, that intrude into navigable airspace.

77. The problem of potential interference to avionics by FM stations is well known to the Commission. It has been handled satisfactorily in the past via coordination procedures with the FAA, and we are confident that any potential interference problems can continue to be handled effectively. Finally, we note that the minimum requirement for antenna height above average terrain (HAAT) is not a requirement on the antenna tower structure itself. Thus, it is difficult to estimate the problems that could arise due to the Class C minimum HAAT requirement. Antenna tower heights normally are supplied to the FAA at the application stage when individual antenna height above ground is known. This procedure should continue to enable us to sort out any potential problems due to tower heights.

78. *Existing short-spaced stations.* Short-spaced stations are those licensed prior to adoption of the minimum distance separation requirements that failed to meet the new spacings (*Fourth Report and Order* in Docket No. 14185). ABES urged the Commission to correct the defects adopted for consideration of short-spaced stations in Docket No. 14185 (see Section 73.213). They recommended that the short-spaced station rules be amended to accord full protection from second and third adjacent channel interference. They suggest these cases be administered in a manner similar to the educational rules (Section 73.509), where actual signal strengths are used to determine allowable radiation.

79. The *Notice* stated that the rules governing existing short-spaced stations would be examined later if necessary. In the

[33] These parties indicated that interference to aviation services can be caused by intermodulation products of two or more FM broadcast signals or by the combined field strengths from high powered FM stations causing receiver desensitization.

meantime we have determined that short-spaced stations shall continue to be subject to the existing rules. If these stations are reclassified, separation will be based on their previous class of station.

80. *Implementation.* The Commission is aware of the tremendous interest many groups and individuals have in the outcome of this proceeding. Since the *Notice* was adopted, status inquiries have been made on a daily basis. These contacts and our own investigations lead us to believe that a pent-up demand will be unleashed after adoption of the rule changes outlined above. Our goal is to respond to requests for new allotments as quickly as possible and minimize the backlog of mutually exclusive petitions. Proceedings addressing such petitions take considerably longer to resolve and place greater demands on the Commission's legal and technical staff than the routine uncontested proceedings. To facilitate prompt service to the public, we also desire to process applications quickly.

81. Unfortunately, our present staff resources are not adequate to respond in a reasonable time even if our expectation of demand is grossly overstated. Consequently, we will delay the effective date of the new rules until sufficient staff is available to handle the increased workload.[34] When additional resources are made available, the Commission will begin modifying its computer programs to permit the use of the new rules. At the same time, we shall institute a rather large scale rule making to amend the FM Table of Assignments using approximately 500 locations from the "needs" list compiled for the Region 2 Conference on AM broadcasting.

82. That rule making will request the public to indicate interest in the proposed assignments or to propose alternative assignments by the comment date. Only in that manner can the Commission avoid receiving an overwhelmingly large number of petitions on the effective date of the new rules. We believe our course of action is preferable since it allows us to maintain control over the initial proposals and any counter proposals that may be made. Similarly, we shall attempt to avoid the filing of a large number of applications for new allotments which might occur if a single Report and Order were adopted that addressed them *in toto*. Therefore we shall adopt a series of Reports and Orders addressing the proposed allotments in individual groups. In this manner, applications should be effectively metered to correspond to the Commission's staff resources.

83. Upon completion of the omnibus proceeding, other FM petitions for amendment of the Table will be accepted and considered. Before the effective date of the new rules, any petitions or

[34] The Senate Commerce Committee has already recommended an increase in the Commission's FY 1984 budget to specify funds for the processing of FM petitions and applications received because of rule changes made in the instant proceeding. The House Appropriations Committee has also recommended additional FY 1984 funds to increase the staff to respond to the anticipated increased workload.

applications that do not conform to the "old" rules will be returned. The Commission regrets that this unusual procedure is necessary. However, we must be in a position to address petitions and applications upon the effective date of the new rules and no suitable alternative exists given our present resources.

84. *Metrication.* As indicated in the *Notice*, we believe that this would be an appropriate time to convert the FM broadcast service to the International System of Units in order to conform to the Commission's program for conversion of all our rules to metric (see Public Notice, FCC 76–737, July 28, 1976). The Commission believes the conversions should be realistic values of "convenient" metric figures rather than a simple multiplication by the appropriate factor. For example, antenna height maxima will be 100, 150, 300, and 600 meters rather than the 92, 153, 305, and 610 meters proposed.[35] In all cases, the metric term shall be the determining factor in any discrepancies. Also, the rules adopted today will govern any disputes that may arise and will take precedence over any other rule sections which may refer or relate to the changes being made herein.[36] Obviously, all circumstances cannot be anticipated. Therefore, the Commission will offer continuing guidance on this subject as appropriate.

CONCLUSION

85. Since certain modifications can be made without affecting the primary service areas of existing stations and there appear to be many underserved locations, the Commission is persuaded that changes to the FM allotment rules are appropriate. Therefore, we shall: (1) allow Class A stations to operate on all channels, (2) authorize three new classes of stations, and (3) reclassify existing stations, after a period of three years, according to their operating facilities.

86. Although every effort has been made to hold constant the present degree of expected service, a station's existing predicted primary service area may change slightly due to the introduction of new classes of stations, reclassification, or conversion to the International System of Units. Any subsequent additions to the FM Table of

[35] We recognize that some requirements will increase while others will decrease. However, conversion to convenient numbers is preferred notwithstanding any slight modifications that may result. Of course, all stations operating with facilities in excess of the maximums adopted will be permitted to continue operating with their existing facilities.

[36] All factors have been converted to the appropriate decimal place of their metric equivalent. For convenience, some conversion factors are listed below:

meters	=	.3048 x feet
kilometers	=	1.609 x miles
square kilometers	=	.386 x square miles

Assignments resulting in the operation of new stations will be in accordance with the rules established herein, and as such their operation will not constitute a modification of existing licenses under Section 316 of the Communications Act of 1934, as amended. *WBEN, Inc. v. United States*, 396 F. 2d 601 (2nd Cir. 1968). Accordingly, hearings at the time of actual individual changes are not required and are not anticipated. In view of the detailed nature of this proceeding, we are confident that the Mass Media Bureau expeditiously can resolve disputes which may arise as a result of the conversion process. Accordingly, we delegate to the Chief, Mass Media Bureau, such authority.

87. Because the Commission wishes to adopt new classes of stations but reject the uniform protection standard of 1 mV/m (60 dBu), slight adjustments have been made to the proposed facilities of the new classes of stations. Although three additional classes (Class B1, B, and C1) were proposed for Zone II, we believe that the two chosen offer approximately the same variety as the three intended under the uniform protection standard.[37] Therefore, the following is a summary of the classes, maximum facilities, allowed zone, and, for reference only, the approximate co-channel primary service ranges and resultant field strengths:

Station Class	*Maximum Facilities kW & m.(ft.)*	*Permitted Zone*	*Service Radius km.(mi.)*	*Field Strength mV/m (dBu)*
A	3 & 100 (328)	1&2	24 (15)	1.0 (60)
B1	25 & 100 (328)	1	45 (28)	.7 (57)
B	50 & 150 (492)	1	64 (40)	.5 (54)
C2	50 & 150 (492)	2	52 (32)	1.0 (60)
C1	100 & 300 (984)	2	72 (45)	1.0 (60)
C	100 & 600 (1968)	2	92 (57)	1.0 (60)

88. NTIA also suggested that minimum facilities be based on the distance to the 1 mV/m (60 dBu) contour. Although this coverage is an important consideration, the determining factor must be a station's authorized power and minimum antenna heights are, in most cases, unduly restrictive. The Commission continues to believe that the city grade signal requirement is normally the best way to enforce minimum areas of service. Only Class C stations will have a minimum antenna height requirement to exceed the Class C1 maximum of 300 meters (984 feet). Some parties expressed the opinion that this would be a discriminatory policy toward Class C licensees. ABES and others questioned the choice of the minimum

[37] The definition of Class C1 was kept in order to avoid confusion with the Canadian Class C1 that also is allowed 100 kW ERP and 300 meters HAAT. This results in Class C2 denoting a smaller facility station than Class C1. Although the Class C2 would be allowed the same facilities as a Class B station, its service radius would only be 52 kilometers (32 miles) rather than the 64 kilometer (40 mile) range of the Class B.

height requirement for Class C stations and said that simply choosing one-half the existing maximum height was arbitrary. The Commission, however, is convinced from its own records and the data submitted by NTIA that an antenna height of 600 meters (1968 feet) HAAT is an unrealistic expectation for most of the country. While we do not wish to foreclose the possibility of this extended coverage station altogether, the Commission believes that, since 80% of the Class C facilities operate below the Class C1 requirements, recognizing this condition via a minimum antenna height is completely justifiable.

89. On the other hand, we are attempting to better define a station's class based on its operating facilities. Since the station should clearly belong to one class of station, minimum power requirements will be set as proposed. Therefore, the minimum power per class must exceed the maximum of the next lower class for its zone, except for Class A stations which will continue to have a minimum requirement of 100 watts.

90. The Commission also is adopting an amended distance separation table to incorporate the new classes of stations. New separations are inserted for the new class relationships that recognize that interference within the primary service ranges for each class of station does not exceed an undesired to desired ratio of 1:10 (-20dB) for co-channel stations and 1:2 (-6dB) for first-adjacent channel stations. The existing co-channel and first adjacent channel separations are the approximate metric equivalent rounded off to the nearest kilometer. The second and third adjacent channel separations represent either the existing spacings converted to kilometers or the "guardband compromise" of not allowing the undesired signal to exceed the desired signal by 100:1 (40 dBu) within the desired station's primary service range, whichever is greater. Finally, the distances for stations separated by 53 or 54 channels correspond to those of the major station classification as proposed in the *Notice*.

91. Those allotments and assignments which are within 320 kilometers (199 miles) of the Canadian or Mexican border must conform to the requirements specified in the FM Broadcast Agreement existing between the United States and the respective country. Since the present agreements do not acknowledge Class B1, Class C2, and, in the case of Mexico, Class C1 stations, these classes of stations must meet the criteria of the Class B or Class C station classes. Thus, the new distance separation requirements are presented in three separate tables depending upon whether the allotments and assignments to be considered are located in the United States, Canada, or Mexico.

92. According to the definitions adopted at the 1979 World Administrative Radio Conference (WARC) of the International Telecommunications Union, the term "allotment" rather than "assignment" more closely identifies the designation of a frequency

or channel for use in a specific geographic area. Assignment is the authorization of a radio frequency channel for use by an entity under specific conditions. Thus, a channel may be *allotted* to a community or place but *assigned* to a licensee. A plan of potential channel designations should be referred to as Table of Allotments. The rules will be amended to denote the Table as the: Table of FM Allotments.

93. In view of the foregoing, IT IS ORDERED, pursuant to the authority of §§ 4(i), 303(f), (g) and (r) and 307(b) of the Communications Act of 1934, as amended, that the rules are amended as set forth in the attached Appendix C, effective on the date specified in a future public notice issued by the Commission indicating that resources have been made available for implementing the new rules (see paragraphs 80 thru 83, *supra*).

94. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED. For further information on this matter contact Kathryn S. Hosford, Mass Media Bureau, (202) 632-9660.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

*Appendices A, B, and Figures 1 and 2 - may be seen in the FCC Dockets Branch.

APPENDIX C

1. Section 73.202 is amended by revising the headnote, paragraph (a) and the heading title of paragraph (b) to read as follows:

§73.202 Table of Allotments.

(a) *General.* The following Table of Allotments contains the channels (other than noncommercial educational Channels 201–220) designated for use in communities in the United States, its territories, and possessions. All listed channels are for Class B stations in Zones I and I-A and for Class C stations in Zone II unless otherwise specifically designated.

(1) Channels designated with an asterisk may only be used by noncommercial educational broadcast stations. Noncommercial educational FM allotments (Channels 201–220) available for use in various communities in Arizona, California, New Mexico, and Texas are listed in §73.504. The rules governing the use of noncommercial educational channels in other communities are contained in §73.501.

(2) Each channel listed in the Table of Allotments reflects the class of station that is authorized, or has an application filed, to use it based on the minimum and maximum facility requirements for each class contained in §73.211.

Note. The provisions of this subparagraph [(a)(2)] become effective [3 years from the effective date of the Report and Order in BC Docket 80–90.].

(b) *Table of FM Allotments.*

* * * * *

2. Section 73.203 is revised in its entirety to read as follows:

§73.203 Availability of channels.

Applications may be filed to construct FM broadcast stations only at the communi-

ties and on the channels contained in the Table of Allotments (§73.202(b)). Applications that fail to comply with this requirement, whether or not accompanied by a petition to amend the Table, will not be accepted for filing. However, applications specifying channels that accord with publicly announced FCC orders changing the Table of Allotments will be accepted for filing even though such applications are tendered before the effective dates of such channel changes.

3. Section 73.204 is revised to read as follows:

§73.204 International agreements and other restrictions on use of channels.

See §§73.207, 73.220, and 73.1650.

4. Section 73.205 is amended by revising the introductory text to read as follows:

§73.205 Zones.

For the purpose of allotments and assignments, the United States is divided into three zones as follows:

5. Section 73.206 is revised in its entirety to read as follows: §73.206 Classes of stations and permissible channels.

(a) The following frequencies are reserved for use by Class A stations:

Frequency (MHz)	*Channel Number*	*Frequency (MHz)*	*Channel Number*
92.1	221	100.1	261
92.7	224	100.9	265
93.5	228	101.7	269
94.3	232	102.3	272
95.3	237	103.1	276
95.9	240	103.9	280
96.7	244	104.9	285
97.7	249	105.5	288
98.3	252	106.3	292
99.3	257	107.1	296

(b) Stations designated as Class A, B1, and B may be authorized in Zones I and I-A. Classes A, C2, C1, and C may be authorized in Zone II. The facilities for each class of station are listed in §73.211. The 20 channels listed in paragraph (a) of this Section may only be used by Class A stations but the other channels may be used by any class of station.

(c) The rules applicable to a particular station, including minimum and maximum facility requirements, are determined by its class. Class designation is based on the zone in which the station's transmitter is located, or proposed to be located.

6. Section 73.207 is amended by revising paragraphs (a) and (b) to read as follows:

§73.207 Minimum distance separation between stations.

(a) FM allotments and assignments must be separated from other allotments and assignments on the same channel and five adjacent channels by certain minimum distances. If transmitter sites do not meet the minimum distances listed in paragraph (b) of this Section, the Commission will not accept petitions to amend the Table of Allotments, applications for new stations, or applications to change the channel or location of existing assignments. Class D (secondary) assignments, however, are subject only to the separation distances contained in subparagraph (b)(3). (See Section 73.512 for other rules governing the channel and location of Class D (secondary) assignments.)

(b) The distances listed below apply only to allotments and assignments operating on the same channel or one of five critical channels adjacent to the desired channel. The five adjacent channels are the first (200 kHz removed from the main channel), the second (400 kHz removed), the third (600 kHz removed), the fifty-third (10.6 MHz removed), and the fifty-fourth (10.8 MHz removed). The distances shown must be met regardless of which is the proposed station (i.e., distances shown from a new Class A station to an existing Class C station are also the distances between a new Class C station and an existing Class A station).

(1) Allotments and assignments in the United States must be separated from other domestic allotments and assignments by the following minimum distances.

Table A
MINIMUM DISTANCE SEPARATION REQUIREMENTS
in kilometers (miles)

Relation	*Co-channel*	*200 kHz*	*400/600 kHz*	*10.6/10.8 MHz*
A to A	105 (65)	64 (40)	27 (17)	8 (5)
A to B1	138 (86)	89 (55)	48 (30)	8 (5)
A to B	163 (101)	105 (65)	69 (43)	16 (10)
A to C2	163 (101)	103 (64)	55 (34)	32 (20)
A to C1	196 (122)	129 (80)	74 (46)	32 (20)
A to C	222 (138)	169 (105)	105 (65)	32 (20)
B1 to B1	175 (109)	114 (71)	50 (31)	24 (15)
B1 to B	211 (131)	145 (90)	71 (44)	24 (15)
B1 to C2	200 (124)	134 (83)	56 (35)	40 (25)
B1 to C1	233 (145)	161 (100)	77 (48)	40 (25)
B1 to C	259 (161)	193 (120)	97 (60)	40 (25)
B to B	241 (150)	169 (105)	74 (46)	24 (15)
B to C2	237 (147)	164 (102)	74 (46)	40 (25)
B to C1	270 (168)	195 (121)	79 (49)	40 (25)
B to C	274 (170)	217 (135)	105 (65)	40 (25)
C2 to C2	190 (118)	130 (81)	58 (36)	48 (30)
C2 to C1	224 (139)	158 (98)	77 (49)	48 (30)
C2 to C	249 (155)	188 (117)	98 (61)	48 (30)
C1 to C1	245 (152)	177 (110)	82 (51)	48 (30)
C1 to C	270 (168)	209 (130)	101 (63)	48 (30)
C to C	290 (180)	241 (150)	105 (65)	48 (30)

(2) (i) Under the Canada-United States FM Broadcasting Agreement, domestic U.S. allotments and assignments that are located within 320 kilometers (199 miles) of the common border must be separated from Canadian allotments and assignments by the following distances. Class B1 and Class C2 allotments and assignments must be considered Class B allotments and assignments when using this table.

Table B
MINIMUM DISTANCES SEPARATION REQUIREMENTS
in kilometers (miles)

Relation	*Co-channel*	*200 kHz*	*400 kHz*	*600 kHz*
A to A	145 (90)	80 (50)	40 (25)	32 (20)
A to B	217 (135)	137 (85)	72 (45)	64 (40)
A to C1	241 (150)	161 (100)	105 (65)	97 (60)
A to C	241 (150)	193 (120)	121 (75)	113 (70)
B to B	249 (155)	169 (105)	97 (60)	72 (45)
B to C1	274 (170)	201 (125)	121 (75)	97 (60)
B to C	274 (170)	225 (140)	137 (85)	113 (70)
C1 to C1	306 (190)	225 (140)	145 (90)	113 (70)
C1 to C	306 (190)	249 (155)	169 (105)	121 (75)
C to C	306 (190)	257 (160)	169 (105)	129 (80)

(ii) Under the Canada-United States FM Broadcasting Agreement, a short spacing of up to 8 kilometers (5 miles) in the direction of a related station may be considered acceptable depending on the circumstances of each individual case.

(3) Under the Mexican-United States FM Broadcasting Agreement, U.S. allotments and assignments located within 320 kilometers (199 miles) of the common border must be separated from Mexican allotments and assignments by the following distances. Class B1 and Class C2 allotments and assignments must be considered Class B and Class C1 allotments and assignments must be considered Class C when using this table.

Table C
MINIMUM DISTANCE SEPARATION REQUIREMENTS
in kilometers (miles)

Relation	*Co-channel*	*200 kHz*	*400/600 kHz*	*10.6/10.8 MHz*
A to A	105 (65)	65 (40)	25 (15)	8 (5)
A to B	175 (110)	105 (65)	65 (40)	16 (10)
A to C	210 (130)	170 (105)	105 (65)	32 (20)
A to D	95 (60)	50 (30)	25 (15)	8 (5)
B to B	240 (150)	170 (105)	65 (40)	25 (15)
B to C	270 (170)	215 (135)	105 (65)	40 (25)
B to D	170 (105)	95 (60)	65 (40)	16 (10)
C to C	290 (180)	170 (150)	105 (65)	48 (30)
C to D	200 (125)	155 (95)	105 (65)	25 (15)
D to D	18 (11)	10 (6)	5 (3)	3 (2)

* * * * *

7. Section 73.208 is amended by revising paragraphs (a), (b) (2), and (c) to read as follows:

§ 73.208 Reference points and distance computations.

(a) (1) The following reference points must be used to determine distance separation requirements when petitions to amend the Table of Allotments (§ 73.202(b)) are considered:

firstly, transmitter sites if authorized;

secondly, reference coordinates designated by the FCC;

thirdly, coordinates listed in the United States Department of Interior publication entitled *Index to the National Atlas of the United States of America*; or

lastly, coordinates of the main post office.

(The community's reference points for which the petition is submitted will normally be the coordinates listed in the above publication.)

(2) When the distance between communities is calculated using community reference points and it does not meet the minimum separation requirements of § 73.207, the channel may still be allotted if a transmitter site is available that would meet the minimum separation requirements and still permit the proposed station to meet the minimum field strength requirements of § 73.315. A showing indicating the availability of a suitable site should be submitted with the petition. In cases where a station is not authorized in a community or communities and the proposed channel cannot meet the separation requirement a showing should also be made indicating adequate distance between suitable transmitter sites for all communities.

(b) * * *

* * * * *

(2) The coordinates of the other community as listed in the publication listed in paragraph (a) of this Section; or, if not contained therein,

* * * * *

(c) The distance between reference points is considered to be the length of the hypotenuse of a right triangle, one side of which is the difference in latitude of the reference points and the other side the difference in longitude of the two reference points. Distance must be computed by the method given in this paragraph. (This method may be used to accurately determine distances up to 350 kilometers (217 miles)). For these distances, this method will normally be more accurate than calculations using spherical trigonometry that do not correct for the spheriodal shape of the earth. Its accuracy deteriorates rapidly, however, for distances beyond 475 kilometers (295 miles) and it should not be used in those cases.

(1) Convert the latitudes and longitudes to degrees and decimal parts of a degree in accordance with Table I of § 73.698.

(2) Determine the middle latitude of the two reference points to the nearest second of latitude (average the latitudes of the two points).

$$LAT_m = (LAT_1 + LAT_2)/2$$

(3) Determine the number of kilometers per degree of latitude difference for the appropriate middle latitude.

$$LAT_k = 111.108 - .566 \cos(2\ LAT_m)$$

(4) Determine the number of kilometers per degree of longitude difference for the appropriate middle latitude.

$$LONG_k = 111.391 \cos(LAT_m) - .095 \cos(3\ LAT_m)$$

(5) Determine the north-south distance in kilometers.

$$LAT = LAT_k (LAT_1 - LAT_2)$$

(6) Determine the east-west distance in kilometers.

$$LONG = LONG_k (LONG_1 - LONG_2)$$

(7) Determine the distance between the reference points by the square root of the sum of the squares of the distance obtained.

$$DIST = (LAT^2 + LONG^2)^{1/2}$$

where:

LAT_1 & $LONG_1$ = coordinates of one location in decimal degrees.
LAT_2 & $LONG_2$ = coordinates of second location in decimal degrees,
LAT_m = middle latitude between points,
LAT_k = kilometers per degree of latitude difference
$LONG_k$ = kilometers per degree of longitude difference,
LAT = north-south distance in kilometers,
LONG = east-west distance in kilometers, and
DIST = distance between two reference points in kilometers.

In computing the above, sufficient decimal figures must be used to determine the distance to the nearest kilometer.

8. Section 73.209 is amended by revising paragraphs (b) and (c) to read as follows:

§ 73.209 Protection from interference.

* * * * *

(b) The nature and extent of the protection from interference accorded FM broadcast stations operating on Channels 221-300 is limited solely to the protection that results from the distance separation requirements and the rules governing maximum power and antenna heights. These rules are specified in this Sub part.

(c) When the FCC determines that grant of an application would serve the public interest, convenience, and necessity, an antenna location may be specified in a designated antenna farm area that results in separations less than those specified in this Sub part. All FM allotments and assignments must be afforded protection from interference equivalent to the protection afforded under the minimum separations specified in this Sub part.

9. Section 73.211 is revised in its entirety to read as follows:

§ 73.211 Power and antenna height requirements.

(a) *Minimum requirements.* (1) Except as provided in paragraph (b)(2) of this Section, the minimum effective radiated power for:

Class A	stations must equal	0.1 kW	(–10 dBk);	
Class B1	stations must exceed	3 kW	(4.8 dBk);	
Class B	stations must exceed	25 kW	(14 dBk);	
Class C2	stations must exceed	3 kW	(4.8 dBk);	
Class C1	stations must exceed	50 kW	(17 dBk);	and
Class C	stations must equal	100 kW	(20 dBk).	

(2) Class C stations must have a minimum antenna height above average terrain of at least 300 meters (984 feet). No minimum antenna height above average terrain is specified for Classes A, B1, B, C2, or C1 stations.

(b) *Maximum power and antenna height.* (1) The maximum effective radiated power in any direction and maximum antenna height above average terrain (HAAT) for the various classes of stations are listed below:

Class	*Maximum Power*	*Maximum antenna HAAT in meters (feet)*
A	3kW (4.8 dBk)	100 (328)
B1	25 kW (14.0 dBk)	100 (328)
B	50 kW (17.0 dBk)	150 (492)
C2	50 kW (17.0 dBk)	150 (492)
C1	100 kW (20.0 dBk)	300 (984)
C	100 kW (20.0 dBk)	600 (1968)

(2) Antenna heights may exceed that specified in this paragraph if the effective radiated power is reduced so that the distance to the 1 mV/m (60dBu) contour extends no farther than it would if the station were operating with the maximum power and antenna HAAT for its particular class of station. The location of the 1 mV/m (60 dBu) contour is determined using Figure 1 of § 73.333. The antenna HAAT is determined using the procedure contained in § 73.313. When antenna HAAT is less than 30 meters (100 feet), an antenna HAAT of 30 meter (100 feet) must be assumed to determine equivalence. When a station's effective radiated power must be reduced below the normal minimum for its class (specified in paragraph (a)(1) of this Section) the value determined will be the minimum for the particular station involved.

(3) For Class B stations in Puerto Rico and the Virgin Islands, a maximum antenna HAAT of 600 meters (1968 feet) with an effective radiated power of 25 kW will be allowed. For antenna heights above 600 meters (1968 feet), the power must be reduced so that the station's 1 mV/m contour (located pursuant to Figure 1 of § 73.333) will extend no farther from the station's transmitter than with the maximum facilities allowed. For powers above 25 kW (up to 50 kW), no antenna height will be authorized that results in greater coverage by the 1 mV/m contour than can be obtained with the maximum facilities.

(c) *Existing stations.* Stations authorized prior to [the effective date of the Report and Order in BC Docket 80–90] that do not conform to the requirements of this Section, may continue to operate as authorized. Stations operating with facilities in excess of those specified in paragraph (b) of this Section may not increase their effective radiated powers or extend their 1 mV/m field strength contour beyond the location permitted by their present authorizations. The provisions of this Section will not apply to applications to increase facilities for those stations operating with less than the minimum power specified in paragraph (a) of this Section.

10. Section 73.212 is amended by revising paragraph (b) to read as follows:

§ 73.212 Administrative changes in authorizations.

* * * * *

(b) Antenna heights above average terrain will be rounded out to the nearest meter.

11. Section 73.213 is amended by revising paragraphs (a), (e), and subparagraphs (f)(2)(ii) and (iii) to read as follows:

§ 73.213 Stations and spacings below the minimum separations.

(a) Stations authorized prior to November 16, 1964, at locations that do not meet the minimum distances specified in § 73.207 may apply for changes in facilities if the requested facilities conform to those listed in the following table:

Facilities To Be Authorized For Short-Spaced FM Stations

Class of Station	*Separation in kilometers*		*Facilities authorized*	
	Co-channel	*First adjacent*	*Power (kW)*	*Antenna height (meters)*
A to A	72–105		3	100
A to A	64–71		2	100
A to A	less than 64		1	100
A to B		80–105	3	100 Class A
			50	150 Class B
A to B		64–79	3	100 Class A
			20	150 Class B
A to B		less than 64	3	100 Class A
			10	150 Class B
A to C		129–169	3	100 Class A
			100	600 Class C
A to C		97–128	3	100 Class A
			50	600 Class C
A to C		less than 97	3	100 Class A
			100	600 Class C
B to B	201–241	129–169	50	150
B to B	161–200	105–128	20	150
B to B	121–160	80–104	10	150
B to B	less than 121	less than 80	5	150
B to C	225–274	177–217	50	150 Class B
			100	600 Class C

B to C	177–224	137–176	20	150 Class B
			50	600 Class C
B to C	145–176	97–136	10	150 Class B
			20	600 Class C
B to C	less than 145	less than 97	5	150 Class B
			10	600 Class C
C to C	241–290	201–241	100	600
C to C	193–240	153–200	50	600
C to C	161–192	121–152	20	600
C to C	less than 161	less than 121	10	600

* * * * *

(e) The powers listed in the table are the maximums the FCC will authorize. Antenna heights may exceed those specified in the table if the effective radiated power is reduced so that the 1 mV/m contour extends no further than it would with the maximum power and antenna height. The antenna height value to be used is that above average terrain and not that in any particular direction. When antenna heights are less than 30 meters (100 feet), a value of 30 meters (100 feet) must be assumed for the purposes of this paragraph.

(f) * * *

* * * * *

(2) * * *

(i) * * *

(ii) When a station does not meet the minimum separations to co-channel or first adjacent channel stations, it may apply for up to the maximum listed facilities for the separations that would exist at the new transmitter site. (See subdivision (iii) of this subparagraph for further restrictions on very short-spaced stations).

(iii) The provisions of this subparagraph apply where the resulting separation after the move would be less than: co-channel, 64 kilometers Class A to Class A, 121 kilometers Class B to Class B, 145 kilometers Class B to C or vice versa, or 161 kilometers Class C to Class C; first adjacent channel 64 kilometers Class A to Class B or vice versa, 80 kilometers Class B to Class B, 97 kilometers Class A or B to Class C, or vice versa, and 121 kilometers Class C to Class C. Stations so situated may apply to move and use either their present facilities or no more than those specified for their distance brackets in paragraph (a) of this Section, if the move would not decrease the short distance by more than 5 kilometers. If the move would decrease the short distance a greater amount, a station will be permitted no more than the facilities that would give it, in the critical direction, a 1 mV/m contour located no further out than that which would result from using the former location and the maximum facilities specified for the distance bracket.

Note. For the purposes of the above Section, Classes B1 and C2 will be considered Class B and Class C1 will be considered Class C until further notice.

12. Section 73.220 amended.

In paragraph (a) the phrase "500 feet" is revised to read "150 meters (492 feet)."

13. Section 73.240 amended.

In paragraph (a)(2) the phase "100 miles" is revised to read "160 kilometers (100 miles)."

14. Section 73.310 is amended by revising the headnote and the first two definitions in paragraph (a) to read as follows:

§ 73.310 FM technical definitions.

(a) *Antenna height above average terrain, (HAAT).* HAAT is calculated by: determining the average of the antenna heights above the terrain from 3 to 16 kilometers (2 to 10 miles) from the antenna for the eight directions evenly spaced for each 45 ° of azimuth starting with True North (a different antenna height will be determined in each direction from the antenna); and computing the average of these separate heights. In some cases less than eight directions may be used. (See § 73.313(d).) Where circular or elliptical polarization is used, the antenna height above average terrain must be based upon the height of the radiation of the antenna that transmits the horizontal component of radiation.

Antenna power gain. The square of the ratio of the root-mean-square (RMS) free space field strength produced at 1 kilometer in the horizontal plane in millivolts per meter for 1 kW antenna input power to 221.4 mV/m. This ratio is expressed in decibels (dB). If specified for a particular direction, antenna power gain is based on the field strength in that direction only.

* * * * *

15. Section 73.313 is amended by revising paragraphs (c) [introduction], (c)(1), (d), (e), (f), (g), and (h) to read as follows:

§ 73.313 Prediction of coverage.

* * * * *

(c) In predicting the distance to the field strength contours, the F(50,50) field strength chart, Figure 1 of § 73.333 must be used. The 50% field strength is defined as that value exceeded for 50% of the time.

(1) The F(50,50) chart gives the estimated 50% field strengths exceeded at 50% of the locations in dB above 1 uV/m. The chart is based on an effective power radiated from a half-wave dipole antenna in free space, that produces an unattenuated field strength at 1 kilometer of about 107 dB above 1 uV/m (221.4 mV/m).

* * * * *

(d) The antenna height to be used with this chart is the height of the radiation center of the antenna above the average terrain along the radial in question. In determining the average elevation of the terrain, the elevations between 3 and 16 kilometers from the antenna site are used.

(1) Profile graphs must be drawn for eight radials beginning at the antenna site and extending 16 kilometers therefrom. The radials should be drawn for each 45 ° of azimuth starting with True North. At least one radial must include the principal community to be served even though it may be more than 16 kilometers from the antenna site. However, in the event none of the evenly spaced radials include the principal community to be served, and one or more such radials are drawn in addition, these radials must not be used in computing the antenna height above average terrain.

(2) Where the 3 to 16 kilometers portion of a radial extends in whole or in part over a large body of water or extends over foreign territory but the 50 uV/m contour encompasses land area within the United States beyond the 16 kilometers portion of the radial, the entire 3 to 16 kilometers portion of the radial must be included in the computation of antenna height above average terrain. However, where the 50 uV/m contour does not so encompass United States land area and (i) the entire 3 to 16 kilometers portion of the radial extends over large bodies of water or foreign territory, such radial must be completely omitted from the computation of antenna height above average terrain, and (ii) where a part of the 3 to 16 kilometers portion of a radial extends over large bodies of water or over foreign territory, only that part of the radial extending from the 3 kilometers sector to the outermost portion of land

area within the United States covered by the radial must be used in the computation of antenna height above average terrain.

(3) The profile graph for each radial should be plotted by contour intervals of from 12 to 30 meters and, where the data permits, at least 50 points of elevation (generally uniformly spaced) should be used for each radial. In instances of very rugged terrain where the use of contour intervals of 30 meters would result in several points in a short distance, 60 or 120 meter contour intervals may be used for such distances. On the other hand, where the terrain is uniform or gently sloping the smallest contour interval indicated on the topographic map should be used, although only relatively few points may be available. The profile graph should indicate the topography accurately for each radial, and the graphs should be plotted with the distance in kilometers as the abscissa and the elevation in meters above mean sea level as the ordinate. The profile graphs should indicate the source of the topographical data used. The graph should also show the elevation of the center of the radiating system. The graph may be plotted either on rectangular coordinate paper or on special paper that shows the curvature of the earth. It is not necessary to take the curvature of the earth into consideration in this procedure, as this factor is taken care of in the charts showing signal strengths. The average elevation of the 13 kilometer distance between 3 and 16 kilometers from the antenna site should then be determined from the profile graph for each radial. This may be obtained by averaging a large number of equally spaced points, by using a planimeter, or by obtaining the median elevation (that exceeded for 50% of the distance) in sectors and averaging those values.

(4) Examples of HAAT calculations:

(i) The heights above average terrain on the eight radials are as follows:

	Meters
0°	120
45°	255
90°	185
135°	90
180°	-10
225°	-85
270°	40
315°	85

The antenna height above terrain (defined in § 73.310(a)) is computed as follows:

(120 + 255 + 185 + 90 - 10 - 85 + 40 + 85) / 8 = 85 meters.

(ii) Same as (i), except the O ° radial is entirely over sea water. The antenna height above average terrain is computed as follows (note that the divisor is 7 not 8):

(255 + 185 + 90 - 10 - 85 + 40 + 85) / 7 = 80 meters.

(iii) Same as (i), except that only the first 10 kilometers of the 90 ° radial are in the United States; beyond 10 kilometers the 90 ° radial is in a foreign country. The height above average terrain of the 3 to 10 kilometer portion of the 90 ° radial is 105 meters. The antenna height above average terrain is computed as follows (note that the divisor is 8 not 7.5):

(120 + 255 + 105 + 90 - 10 - 85 + 40 + 85) / 8 = 75 meters.

(e) In cases where the terrain in one or more directions from the antenna site departs widely from the average elevation of the 3 to 16 kilometer sector, the prediction method may indicate contour distances that are different from what may

be expected in practice. For example, a mountain ridge may indicate the practical limit of service although the prediction method may indicate otherwise. In such cases, the prediction method should be followed, but a supplemental showing may be made concerning the contour distances as determined by other means. Such supplemental showings should describe the procedure used and should include sample calculations. Maps of predicted coverage should include both the coverage as predicted by the regular method and as predicted by a supplemental method. When measurements of area are required, these should include the area obtained by the regular prediction method and the area obtained by the supplemental method. In directions where the terrain is such that antenna heights less than 30 meters for the 3 to 16 kilometer sector are obtained, an assumed height of 30 meters must be used for the prediction of coverage. However, where the actual contour distances are critical factors, a supplemental showing of expected coverage must be included together with a description of the method used in predicting such coverage. In special cases, the FCC may require additional information as to terrain and coverage.

(f) The effect of terrain roughness on the predicted field strength of a signal at points distant from an FM transmitting antenna is assumed to depend on the magnitude of a terrain roughness factor (h) which, for a specific propagation path, is determined by the characteristics of a segment of the terrain profile for that path 40 kilometers in length located between 10 and 50 kilometers from the antenna. The terrain roughness factor has a value equal to the distance, in meters, between elevations exceeded by all points on the profile for 10% and 90% respectively, of the length of the profile segment. (See § 73.333, Figure 4.)

(g) If the lowest field strength value of interest is initially predicted to occur over a particular propagation path at a distance that is less than 50 kilometers from the antenna, the terrain profile segment used in the determination of terrain roughness factor over that path must be that included between points 10 kilometers from the transmitter and such lesser distances. No terrain roughness correction need be applied when all field strength values of interest are predicted to occur 10 kilometers or less from the transmitting antenna.

(h) Profile segments prepared for terrain roughness factor determinations are to be plotted in rectangular coordinates, with no less than 50 points evenly spaced within the segment using data obtained from topographic maps with contour intervals of approximately 15 meters (50 feet) or less if available.

* * * * *

16. Section 73.314 is amended by revising paragraphs (b)(1)(ii), (b)(2) [introduction], and subparagraphs (ii), (v), (vii), and (viii) to read as follows:

§ 73.314 Field strength measurements.

(b) * * *

(1) * * *

(i) * * *

(ii) Each radial is marked, at a point exactly 16 kilometers from the transmitter and, at greater distances, at successive 3 kilometer intervals. Where measurements are to be conducted over extremely rugged terrain, shorter intervals may be used, but all such intervals must be of equal length. Accessible roads intersecting each radial as nearly as possible at each 3 kilometer marker are selected. These intersections are the points on the radial at which measurements are to be made, and are referred to subsequently as measuring locations. The elevation of each measuring location should approach the elevation at the corresponding 3 kilometer marker as nearly as possible.

(2) *Measurement procedure.* All measurements must be made utilizing a receiving

antenna designed for reception of the horizontally polarized signal component, elevated 9 meters above the roadbed. At each measuring location, the following procedure must be used:

(i) * * *

(ii) The antenna is elevated to a height of 9 meters.

* * * * *

(v) A mobile run of at least 30 meters is made, that is centered on the intersection of the radial and the road, and the measured field strength is continuously recorded on a chart recorder over the length of the run.

* * * * *

(vii) If, during the test conducted as described in paragraph (b)(2)(iii) of this Section, the strongest signal is found to come from a direction other than from the transmitter, after the mobile run prescribed in subparagraph (b)(2)(v) of this Section is concluded, additional measurements must be made in a "cluster" of at least five fixed points. At each such point, the field strengths with the antenna oriented toward the transmitter, and with the antenna oriented so as to receive the strongest field, are measured and recorded. Generally, all points should be within 60 meters of the center point of the mobile run.

(viii) If overhead obstacles preclude a mobile run of at least 30 meters, a "cluster" of five spot measurements may be made in lieu of this run. The first measurement in the cluster is identified. Generally, the locations for other measurements must be within 60 meters of the location of the first.

* * * * *

(c) * * *

* * * * *

(2) *Measurement procedure.* All measurements must be made using a receiving antenna designed for reception of the horizontally polarized signal component, elevated 9 meters above ground level.

* * * * *

17. Section 73.316 is amended by revising the headnote and paragraph (e) to read as follows:

§ 73.316 FM antenna systems.

* * * * *

(e) Applications proposing the use of FM transmitting antennas in the immediate vicinity (*i.e.* 60 meters or less) of other FM or TV broadcast antennas must include a showing as to the expected effect, if any, of such approximate operation.

* * * * *

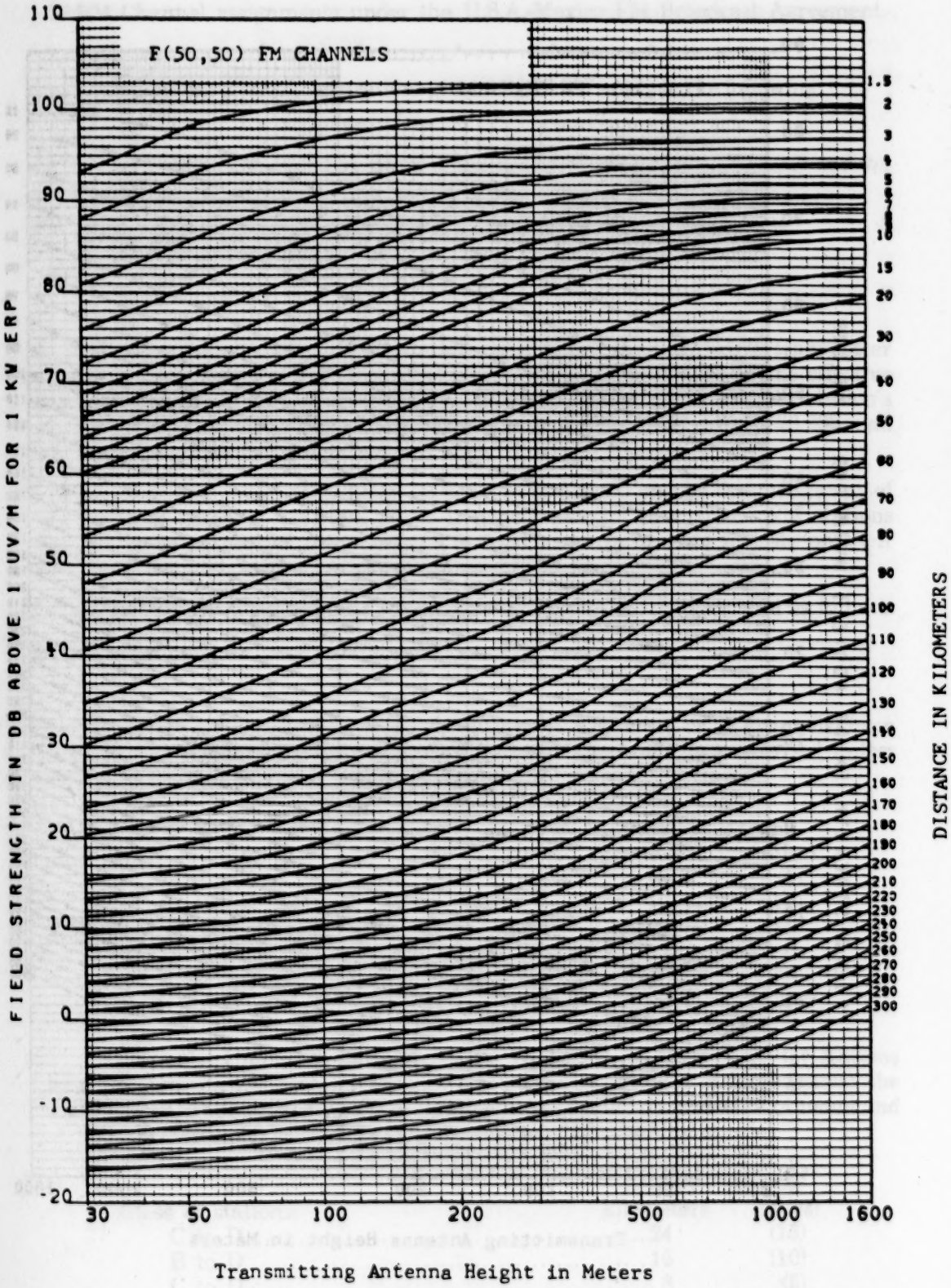
18. Section 73.333 is amended by revising the introductory text, Figures 1 and 1a, and deleting Figure 3 as follows:

§ 73.333 Engineering charts.

This Section consists of the following Figures 1, 1a, and slider, 4, and 5 (Figure 3 deleted).

* * * * *

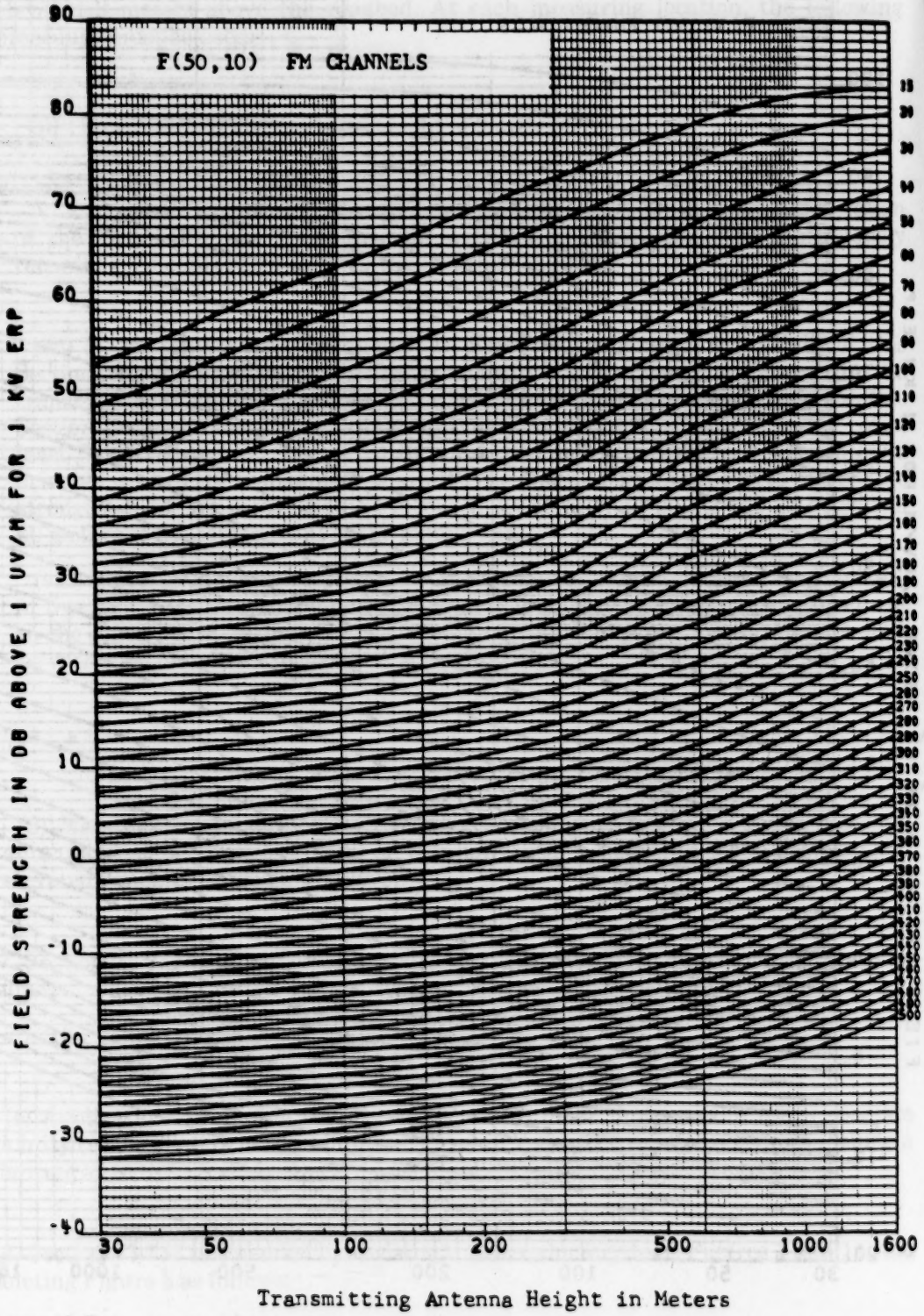
19. Section 73.504 is amended by revising the introduction of paragraph (c) to read as follows:



FCC §73.333 FIGURE 1

FM CHANNELS

ESTIMATED FIELD STRENGTH EXCEEDED AT 50 PERCENT
OF THE POTENTIAL RECEIVER LOCATIONS FOR AT LEAST 50 PERCENT
OF THE TIME AT A RECEIVING ANTENNA HEIGHT OF 9 METERS



FCC §73.333 FIGURE 1a

FM CHANNELS

ESTIMATED FIELD STRENGTH EXCEEDED AT 50 PERCENT OF THE POTENTIAL RECEIVER LOCATIONS FOR AT LEAST 10 PERCENT OF THE TIME AT A RECEIVING ANTENNA HEIGHT OF 9 METERS

§ 73.504 Channel assignments under the U.S.A.-Mexico FM Broadcast Agreement.

* * * * *

(c) The minimum distance separations given in § 73.207 apply to the following:

* * * * *

20. Section 73.506 is amended by revising the headnote and paragraphs (a)(3) and (b), and by adding new paragraph (c) to read as follows:

§ 73.506 Classes of Noncommercial Educational FM stations and channels.

(a) * * *

* * * * *

(3) Noncommercial educational stations with more than 0.01 kW transmitter power output are classified Class A, B1, B, C2, C1, or C, depending on the effective radiated power, antenna height above terrain, and the zone in which the station's transmitter is located, on the same basis as provided for in §§ 73.205, 73.206, and 73.211 for stations on the non-reserved FM channels.

(b) Any noncommercial educational station except Class D may be assigned to any of the channels listed in § 73.501. Class D noncommercial educational FM stations applied for or authorized prior to June 1, 1980, may continue to operate on their authorized channels subject to the provisions of § 73.512.

21. Section 73.507 is amended by revising paragraph (c) and note to read as follows:

§ 73.507 Minimum distance separation between stations.

* * * * *

(c)(1) Stations separated in frequency by 10.6 or 10.8 MHz (53 or 54 channels) from allotments or assignments on non-reserved channels will not be authorized unless they conform to the following separation table:

Class of stations:	Required spacing kilometers	(miles)
A to A	8	(5)
B to A	16	(10)
B to B	24	(15)
C to A	32	(20)
C to B	40	(25)
C to C	48	(30)

(2) Under the United States-Mexican FM Broadcasting Agreement, for stations and assignments differing in frequency by 10.6 to 10.8 MHz (53 or 54 channels), the following separations apply to U.S. noncommercial educational FM allotments and assignments and Mexican allotments or assignments in the border area.

Class of stations:	Required spacing kilometers	(miles)
C to D	24	(15)
B to D	16	(10)
C to D	8	(5)
D to D	3	(2)

Note. For purposes of this Section, Classes B1 and C2 will be considered Class B, and Class C1 will be considered Class C until further notice.

22. Section 73.509 is amended by revising paragraph (e) to read as follows:

§ 73.509 Protection from interference.

* * * * *

(e) No application for FM Channel 200 will be accepted if the requested facility would cause interference to Channel 6 operations, including TV translators on this channel. Such objectionable interference will be considered to exist whenever the 15 dBu contour of the proposal, based on the F(50,10) curves in § 73.333 Figure 1a, would overlap the 40 dBu contour of the television station, based on the F(50,50) curves in § 73.333 Figure 1.

23. Section 73.511 is amended by revising paragraph (b) to read as follows:

§ 73.511 Power and antenna height requirements.

* * * * *

(b) On Channels 218, 219, and 220 specified in § 73.501, no educational station will be authorized with effective radiated power greater than that specified in § 73.211(b)(1) for the respective class of station, and the maximum effective radiated power permissible shall also be subject to the provisions of § 73.211(b)(2).

23. Section 73.3573 is amended by revising paragraphs (a)(1) and (c) as follows:

§ 73.3573 Processing FM broadcast and FM translator station applications.

(a) * * *

(1) In the first group are applications for new stations or for major changes in the facilities of authorized stations. A major change for FM stations authorized under this Part is any change in frequency, station location, or class of station; or, any antenna location which would result in a change of 50% or more in the area within the station's predicted 1 mV/m field strength contour. (A change in area is defined as the sum of the area gained and the area lost as a percentage of the original area.) For FM translator stations authorized under Part 74, it is any change in frequency (output channel), primary stations, or authorized principal community or area. However, the FCC may, within 15 days after the acceptance for filing of any other application for modification of facilities, advise the applicant that such application is considered to be one for a major change and therefore is subject to the provisions of §§ 73.3580 and 1.1111 pertaining to major changes.

* * * * *

(c) If, upon examination, the FCC finds that the public interest, convenience and necessity will be served by the granting of an application for FM broadcast facilities, the same will be granted. If the FCC is unable to make such a finding and it appears that a hearing may be required, the procedure given in § 73.3593 will be followed.

* * * * *

Dissenting Statement of FCC Commissioner James H. Quello

In Re: FM Drop-Ins - Docket No. 80–90

I don't believe the engineering record or the hypothetical need developed in Docket 80–90 justifies the proposed widescale increase in FM allotments.

This action would cause degraded service, turmoil and interference for millions of existing listeners, contention and litigation among applicants and further administrative burdens on a Mass Media Bureau already overburdened with a huge backlog of AM-FM and low power TV applications.

I believe a wiser, more reasoned approach would be to present new FM allotments on a case-by-case basis through waiver requests. This would provide an opportunity to actually test the extent of interference and overall public acceptance before risking an untested, strongly contested, widescale increase and reallotment.

I lend considerable weight to the expert engineering study by A. D. Ring which indicates a net loss in service would result in the Commission's proposals. I agree with the logic in the study that any increase in FM availability would cause a significant detriment to present listening. Also, I believe it is a rule of physics, not of this Commission, that a new station causes interference far beyond the boundaries of new service.

I'm concerned that the value of a strong secondary service now enjoyed by millions of listeners is allotted a much lower priority than the undocumented need for a new, frequently substandard, FM service. I also believe FM stereo should be treated as a significant state of the art improvement in basic service, rather than as a mere expendable ancillary enhancement.

To the extent that the Commission has relied upon the "need" for vastly increased FM allotments, I believe it has been misled. I have seen nothing in the record which documents this alleged need beyond some "wish lists" prepared on a hypothetical basis and largely for purposes other than this *Rulemaking*.

The only rational public interest reason for embarking upon this massive change in the Table of Allotments is to provide for better, more diversified FM radio service to the American people. The fact is, however, this revised scheme of allocation will merely provide different service in many instances and reduced or deleted service in others. As suggested before, it is axiomatic that for each new service introduced, interference to existing service is also introduced. For some listeners, their present stereo service will become monaural. For others, their present monaural service will become further degraded or disappear.

SEPARATE STATEMENT OF COMMISSIONER HENRY M. RIVERA

RE: Modification of FM Technical Rules to Increase the Availability of Broadcast Stations—BC Docket 80–90.

By this decision, the Commission has dramatically increased the potential for local FM radio service to the American public and the enhanced competition and diversity that increased service implies. The Commission's staff forecasts that many major cities, where additional outlets were previously foreclosed, will now be eligible for additional stations as a consequence of today's rule changes. Many communities in remote locations will now qualify for their first local

service as well. All told, the Mass Media Bureau estimates that this decision will make it possible to satisfy as much as 57 percent of the expressed demand for additional FM radio stations; under the old allocation structure, just seven percent of this demand could have been accommodated. More specifically, of the 1000 communities studied, additional stations can now be assigned to approximately 49 percent which have daytime-only AM service and 31 percent of those which have no local service. This action will also serve the interests of 40 percent of the communities said to need additional minority-owned stations, as well as the interests of 26 percent of the locations desiring additional public radio stations.

The public interest benefits of our decision are clear and substantial. Still, because the paramount objective of this proceeding has been to secure *additional* service, it was imperative for the Commission to ensure that the proposed technical changes to allow additional FM stations would not significantly degrade the FM service overall. With one exception (the uniform protected contour proposal), the Commission has concluded that the addition of new FM stations will not detract materially from the technical integrity of existing FM service, and I believe our determinations in this regard are both responsible and consistent with sound engineering principles.

The Commission has decided that, rather than entertaining random requests for the new channels made possible by these rule changes, most of these new channels should be allotted in one omnibus proceeding. Our decision to amend the FM Table of Allotments accordingly is especially wise. The licensing of additional FM stations will now proceed in a smooth and orderly fashion, which will minimize potential delays and maximize the expeditious delivery of new FM service consistent with FCC resources.

While I would have preferred more expeditious consideration of these proposals, I am delighted that we have finally and affirmatively acted upon them. And, although I wish resource limitations did not require postponing the effective date of our action until Fiscal Year 1984, we will still be moving forward during the intervening four months with preparation of the rulemaking that is required for the public to apply for stations under the newly adopted technical rules.

In sum, this Report and Order marks a renewed Commission commitment to the principles of diversity and competition—principles which must be the basis for the integrity and credibility of our ongoing broadcast deregulatory efforts. The public interest is well-served by this decision in and of itself, and I am especially pleased to see this long-awaited action taken at last.

Intervention, Right To

Appellant listener groups had not met the participation requirements of Section 1.223(b). Nevertheless, because of their long-standing interest in the existing station, the Board will permit a supplemental showing of how their intervention as parties could illuminate the issues in the case.
–GAF B/cing Company, Inc.
BC Docket No. 82–371

FCC 83R–39

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of GAF BROADCASTING COMPANY, INC.	BC Docket No. 82–371 File No. BRH-810202G7
For Renewal of License of Station WNCN (FM) New York, New York	
CLASSICAL RADIO, INC. New York, New York	BC Docket No. 82–372 File No. BPH-810501AD
For Construction Permit	

MEMORANDUM OPINION AND ORDER

(Adopted: May 13, 1983; Released: May 19, 1983.)

BY THE REVIEW BOARD:

1. Before the Review Board for consideration is an appeal filed March 22, 1983 by WNCN Listeners' Guild, Inc. and Classical Radio for Connecticut, Inc. from the presiding Judge's Order (FCC 83M–565, released February 17, 1983) which denied appellants' petition for leave to intervene in this proceeding.[1] Appellants submit that, contrary to the ALJ's ruling, their participation will assist the Commission in resolving the issues in this case. Specifically, they state that neither of the party-applicants is likely to fully develop

[1] Related pleadings before the Board are a petition to accept late-filed pleading, filed March 22, 1983, by appellants, and oppositions to appeal, filed April 1, 1983, by GAF Broadcasting Company, Inc. and the Mass Media Bureau. For good cause shown, we will grant appellants' petition and accept the late-filed appeal.

issues affecting the interests of the public; that, in fact, the litigation thus far has been characterized by personal attacks and accusations of bad faith; and that appellants, who are long-established non-profit representatives of listeners' rights, can aid the Commission because they have no financial stake in the outcome of the case but are concerned only with the development of a full record. In this regard, appellants also claim that serious questions regarding control of the corporate parent of GAF Broadcasting Company, Inc., the existing licensee, require determination on the basis of a complete record.

2. Appellants have not sought intervention under Section 1.223(a) of the Commission's Rules Section 1.223(b) requires, *inter alia*, that a person seeking party status in a hearing "must show how such petitioner's participation will assist the Commission in the determination of the issues in question." Although appellants claim to have met this requirement, the only issue originally designated in this case was the standard comparative issue, and appellants specifically declined to play a role in the hearing of that issue, stating that they "do not seek to participate for the purpose of taking sides on the question of the comparative merits of the licensee and the competing applicant." Petition for Leave to Intervene, filed August 9, 1982, at 3–4. Moreover, while the ALJ subsequently enlarged the issues to explore Classical Radio, Inc.'s technical and financial qualifications (FCC 83M–589, released February 18, 1983), appellants have not indicated that they are prepared to assist in the hearing of these issues, either.[2] Finally, the general public interest role to which appellants advert—assuring development of a full record despite alleged animosity between the applicants—can be and has traditionally been fulfilled by the ALJ and the Mass Media Bureau. *See Muncie Broadcasting Corp.*, 89 FCC 2d 123, 125 n. 1, 51 RR2d 46, 49 n. 1 (Rev. Bd. 1982) (citing *Pressly* v. *FCC*, 437 F.2d 716, 719 (D.C. Cir. 1970). And the Bureau, in its opposition pleading, affirms its intention to carry out this function here.

3. Appellants have presented us with a paradox. On the one hand, they are local listener groups and may, thus, have touched the standing threshold, *Office of Communications of United Church of Christ* v. *FCC*, 359 F.2d 994 (D.C. Cir. 1966) (*U.C.C.*), but, on the other hand, they have not proffered any "specific allegations of fact," required by *U.C.C.*, Section 309(d) of the Communications Act of

[2] The appeal contains no allegations of fact whatever relating to the issues to be tried at the hearing; it contains only a cursory allusion to a claim that "there are serious uncertainties concerning control of GAF Corporation, parent of the present licensee." Appeal, at 3. Other assertions regarding GAF were apparently the subject of a petition to deny by appellants directed against GAF's renewal application. That petition has been twice rejected by the Bureau, pursuant to delegated authority. Letter dated June 21, 1982 by Chief, Broadcast Bureau, *recon. denied*, letter dated October 1, 1982. Pending before the full Commission is an application for review of these staff actions. We of course do not reach the questions raised therein.

1934, as amended, and implicit in Section 1.223(b), that they would pursue if permitted to intervene.[3] Indeed, their petition specifically recites that they "do not propose to raise any issues in addition to those already designated for hearing." Petition, *supra*, at 5. Nor do they claim to be in possession of "special knowledge or evidence" related to the issues. *Cowles Broadcasting, Inc.*, 86 FCC 2d 993, 1019 (1981), *aff'd sub nom. Central Florida Enterprises, Inc.* v. *FCC*. 683 F.2d 503 (D.C. Cir. 1982). In sum, appellants appear ready to conduct a watching brief to "represent the interests of listeners *as they may appear*." Appeal, at 3–4 (emphasis added).

4. The Board does not believe that appellants' very limited scope of proposed participation meets the intervention requirements of Section 1.223(b). Nonetheless, because they have shown long-term interest in Station WNCN(FM), *see FCC* v. *WNCN Listeners' Guild*, *supra*, and in light of the thrust of the *U.C.C.* case, we are reluctant to take an action which could be perceived as summarily hostile to the interest of local citizens groups. Accordingly, we will permit appellants fifteen days to supplement their appeal to show that they have factual information or evidence relevant to the designated issues or to indicate how their intervention as parties could illuminate such issues in ways that they could not achieve as non-party public witnesses. See Section 1.225 of the Rules. As articulated in *U.C.C.*, any supplement should contain specific allegations of fact germane to the issues and the customary attestation to such facts so as "to assure that concrete adverseness" necessary to indicate a justiciable controversy. *Baker* v. *Carr*, 369 U.S. 186, 204 (1962). *See generally* K. Davis, *Administrative Law of the Seventies*, Chapter 22 ("Standing").

5. ACCORDINGLY, IT IS ORDERED, That the petition to accept late-filed pleading, filed March 22, 1983, by WNCN Listeners' Guild, Inc. and Classical Radio for Connecticut, Inc. IS GRANTED, that said appellants SHALL SUPPLEMENT their pending appeal, in accordance with this Memorandum Opinion and Order, within

[3] Although the *U.C.C.* court held that "some 'audience participation' must be allowed in license renewal proceedings," 359 F.2d at 1005, it still required such would-be intervenors to proffer factual allegations necessary to establish a public interest issue. *Id.* As the Supreme Court has held: "Abstract injury is not enough. It must be alleged that the plaintiff 'has sustained or is immediately in danger of sustaining some direct injury' as the result of . . . official conduct." *O'Shea* v. *Littleton*, 414 U.S. 488, 494 (1974). Moreover, the *U.C.C.* court was aware that "private interests may sometimes cloak themselves with a semblance of public interest advocates." *Id.* at 1006. We do not intimate that the Guild's avid interest in promoting a classical music format, *see generally FCC* v. *WNCN Listeners' Guild*, 450 U.S. 582 (1981), is a "private interest." However, the Guild's preference for a particular entertainment format is not at this point germane to the public interest issues designated in this comparative licensing proceeding, and intervention would not be appropriate merely to inject its preference collaterally.

fifteen (15) days after the release hereof, and that replies to the supplement MAY BE FILED within ten (10) days thereafter.

FEDERAL COMMUNICATIONS COMMISSION
JEROLD L. JACOBS, *Member, Review Board*

CATV Cross-Ownership
Divestitures
Tax Certificates

Petition for tax certificate granted for the sale of a Multipoint Distribution System based upon a finding that its operations were technically as well as functionally integrated in large part with a cable system that was sold to promote the Commission's policy against the ownership of a co-located television station and cable system.
–*Georgia Cablevision Corporation*

FCC 83–225

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of:	
GEORGIA CABLEVISION CORPORATION ATLANTA HOME THEATRE Atlanta, Fulton County and DeKalb County, Georgia	CSR-1705
Petition for Partial Reconsideration	

MEMORANDUM OPINION AND ORDER

(Adopted: May 12, 1983 Released: May 26, 1983)

BY THE COMMISSION: COMMISSIONER JONES CONCURRING IN THE RESULTS.

1. Georgia Cablevision Corporation (GCC) and Atlanta Home Theatre (AHT) have filed an unopposed "Petition for Partial Reconsideration" of the Commission's decision in *Georgia Cablevision Corporation and Atlanta Home Theatre* (Atlanta, Georgia), FCC 80–609, 83 FCC 2d 326 (1980). In this proceeding, AHT and GCC, both subsidiaries of Cox Broadcasting Corporation, requested tax certificates, pursuant to Section 1071 of the Internal Revenue Code of 1954, for their sale to Cable America, Inc. Prior to their sale, AHT was the operator of a Multipoint Distribution System serving Atlanta, Fulton County and DeKalb County, Georgia; and GCC was the owner of a cable system serving the same locations.

2. In *Georgia Cablevison Corporation* (Atlanta, Georgia), FCC 77–493, 65 FCC 2d 506 (1977), the Commission granted Cox Broadcasting

Corporation a waiver of Section 76.501(a)(2) of its cross-ownership rule for a two year period.[1] In granting the waiver, the Commission authorized Cox Broadcasting Corporation to increase its previously grand-fathered 56.1 percent ownership interest in GCC to 100 percent. However, at the end of the two year period, Cox Broadcasting Corporation was either to divest itself of GCC or its co-located Television Broadcast Station WSB-TV (NBC, Channel 2) Atlanta, Georgia.[2] The required divestiture was completed on February 7, 1980, when GCC was sold to Cable America, Inc. As part of that same transaction, Cable America, Inc. also acquired AHT. Subsequent to their sale, GCC and AHT filed requests for tax certificates before the Commission.

3. In *Georgia Cablevision Corporation and Atlanta Home Theatre, supra*, the Commission granted GCC a tax certificate after finding that its sale promoted the Commission's policy directed against the concentration of ownership interests between co-located television broadcast stations and cable television systems, as embodied in Section 76.501(a)(2) of the Commission's Rules. However in this same decision, the Commission denied AHT (the MDS operation) a tax certificate for its contemporaneous sale to Cable America, Inc. The Commission concluded that AHT was not entitled to a tax certificate because its sale did not promote any relevant Commission policy. Furthermore, the Commission found that the petitioners failed to demonstrate that AHT's sale was mandated by practical economic necessity which would have entitled it to a tax certificate. Lastly, since AHT and GCC operated alternative communications services in the same television market, the Commission concluded that AHT was not entitled to a tax certificate.

4. In support of their reconsideration petition, the petitioners maintain that the contemporaneous sale of AHT to Cable America, Inc., was mandated by practical economic necessity. The petitioners have submitted a financial analysis of AHT which purportedly demonstrates that it would have had little or no market value if it were separated from GCC. If AHT were operated as a separate entity, the petitioners contend that it would add $90,000 per year to

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[1] The Commission's cross-ownership rule provides in pertinent part:

§76.501 Cross Ownership

(a) No cable television system (including all parties under common control) shall carry the signal of any television broadcast station if such system directly or indirectly owns, operates, controls, or has an interest in:

(2) A television broadcast station whose predicted Grade B contour, computed in accordance with §73.684 of this chapter, overlaps in whole or in part the service area of such system (i.e., the area within which the system is serving subscribers).

[2] The two year period was subsequently extended by the Commission to April 12, 1980.

AHT's already substantial losses. Moreover they allege that the $90,000 of added losses would increase 10% each year due to inflation. These added costs would result from AHT having to rent its own office space, hire a separate general manager, office manager, engineer, and support staff. Presently, AHT shares the above costs with GCC. Additionally, the petitioners have submitted a *pro forma* financial statement for the years 1979–1984. The statement shows a loss of $202,000 for 1979 if AHT were to be operated separately. For the years 1980–1984, the *pro forma* statement projects losses of $227,000, $262,000, $373,000, $429,000 and $566,000, respectively. Faced with these projections, AHT and GCC submit that any prospective purchaser would consider AHT, by itself, an unattractive property. Consequently, they maintain that AHT could not have been sold separately. Buttressing this point, the petitioners have submitted a letter from Mr. Robert Holman, Vice President, Daniels and Associates, Inc., the broker for AHT's sale to Cable America, Inc. In his letter, Mr. Holman states that it is his belief ". . . that if the MDS business and the CATV system were sold separately the total price realized for both properties would most likely have been appreciably less than the lump sum price paid for both businesses which were sold together."

5. In response to the Commission's initial decision finding that AHT and GCC were alternative communications services and therefore may not reasonably be considered one operational entity, the petitioners contend that their MDS and cable operations were complementary rather than competitive services. In support of this contention, the petitioners cite the Commission's language in its pending *Notice of Inquiry and Proposed Rulemaking Order in Docket No. 80–112*, FCC 80–136, released May 2, 1980, wherein the Commission commented that:

> MDS is sometimes viewed alternatively as a CATV adjunct or competitor. Overall, it appears that MDS demand is greatest where CATV facilities do not exist or have not penetrated that relevant market. In some cases MDS serves as a conduit to provide programming to CATV systems, particularly in areas where there are multiple cable "headends". Thus, to some extent the two systems are complementary. However, should CATV develop as a broadband wired distribution system with access to most homes, the demand for MDS type services would likely substantially decrease. (At paragraph 27.)

They maintain that as cable service expands in the Atlanta market MDS subscribers will switch to cable thereby eliminating MDS service to all but the most sparsely populated areas. Consistent with this contention, the petitioners have based their financial *pro forma* projections for AHT on a decreasing MDS subscriber base. The petitioners estimate that AHT will lose almost 40 percent of its 1979 subscriber base to cable by the year 1984.

6. Lastly, the petitioners contend that because of the nature of their interrelationship, AHT and GCC are in effect one operational

entity. They point out, as mentioned above, that both companies are located in the same building, share the same office space, have one general manager, one office manager and one engineer for both companies. They also point out that GCC's total pay-TV subscribership receives its pay-TV signal from AHT. Moreover, six of the apartment complexes served by AHT take a feed off of GCC's cable. Consequently, the petitioners aver that GCC and AHT constitute a single entity and the sale of one mandated the sale of the other to one purchaser.

7. In our original decision, we concluded that the petitioners failed to establish that the sale of AHT to Cable America, Inc. was mandated by practical economic necessity. We found that the fact that AHT shared certain of its resources with GCC standing alone did not justify a finding that practical economic necessity mandated AHT's sale. However, in their petition for reconsideration, the petitioners have introduced new evidence which demonstrates that based upon the totality of circumstances here presented AHT's sale to Cable America, Inc. was mandated by practical economic necessity. Consequently, we find that AHT's sale falls within the ambit of the Commission's case law which permits the issuance of a tax certificate based upon a showing of economic necessity. In this vein, AHT has demonstrated that if it were to be operated apart from GCC its operating losses would substantially increase and these losses would likely accelerate with the growth in the cable system. Additionally, AHT has demonstrated that its operations are technically as well as functionally integrated in large part with GCC's. Furthermore, we note that since GCC and AHT operate within the same service area the economy of operating them together is apparent. In light of the above factors, we find that the petitioners have substantiated their assertion that the sale of GCC, which was directed by the Commission, operated as a practical matter to mandate the sale of AHT to the same purchaser. Consequently, the sale of AHT to Cable America, Inc. was necessary since practical economic necessity mandated its sale as a consequence of GCC's sale, which promoted the Commission's policy against the common ownership of co-located television broadcast stations and cable television systems. See *Kansas State Network*, FCC 82–82, 89 FCC 2d 392 (1982) *appeal filed*, No. 82–1319 (D.C. Cir. March 26, 1982); *Continental Telephone Corp.*, FCC 75–34, 51 FCC 2d 284 (1975); *King Video Company* (Elma, Washington), FCC 74–1339, 49 FCC 2d 1297 (1974); and *Cosmos Cablevision Corp., et al.* (Darlington, South Carolina), FCC 72–72, 33 FCC 2d 293 (1972). Finally, we wish to make it clear that our action today is consistent with the Commission's recent policy statement regarding tax certificates. *Policy Statement on Issuance of Tax Certificates*, 52 RR 2d 757 (1982). The contract for the sale of AHT was signed prior to the November 15, 1982, grandfathering cut off date contained in the policy statement.

Therefore, our decision today is not a modification of the policy annunciated therein. In view of the foregoing, we find that a grant of the petition for partial reconsideration filed by AHT and GCC would be in the public interest.

8. Accordingly, IT IS ORDERED, That the Petition for Partial Reconsideration filed by Georgia Cablevision Corporation and Atlanta Home Theatre (CSR-1705) IS GRANTED.

9. IT IS FURTHER ORDERED, That the tax certificate appended hereto will be issued to Atlanta Home Theatre.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Comparative Hearing
FM Station, Authorization
Minority Ownership
Nighttime Coverage
Review by Review Board

Review Board affirms ALJ's grant to FM broadcast applicant who has moderate comparative coverage preference for serving nighttime "white" area. Winning applicant's small attributable ownership interest in local broadcast production company is *de minimis*, and its 50% integration credit with minority ownership enhancement deemed equal to another's 52% credit.
–Golden State B/cing Corp.
BC Docket No. 79–56

FCC 83R–35

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
GOLDEN STATE BROADCASTING CORP. Tucson, Arizona	BC Docket No. 79–56 File No. BPH-10,041
TUCSON COMMUNITY BROADCASTING, INC. Tucson, Arizona	BC Docket No. 79–58 File No. BPH-10,345
TUCSON FM BROADCASTING CORPORATION Tucson, Arizona	BC Docket No. 79–59 File No. BPH-10,347
For Construction Permit for a New FM Broadcast Station	

Appearances

Marvin Diamond, William S. Reyner, Jr., and *Peter A. Rohrbach*, on behalf of Golden State Broadcasting Corp.; *Carl J. Fielstra*, on behalf of Tucson Community Broadcasting, Inc.; *Richard A. Helmick*, on behalf of Tucson FM Broadcasting Corporation.

DECISION

(Adopted: May 2, 1983; Released: May 9, 1983)

BOARD CHAIRMAN MARINO FOR THE REVIEW BOARD:

1. Three broadcast applicants are competing for the right to establish a new FM station in Tucson, Arizona: Golden State; Tucson Community; and Tucson FM. After a hearing conducted pursuant to the *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965), Administrative Law Judge Coufal concluded that Tucson FM, which received "a significant advantage because it would bring a first nighttime service to 5,564 more people," was the best comparative applicant. Initial Decision, FCC 82D-67, released September 22, 1982, paras. 39, 51. Briefs and exceptions were filed by Golden State and Tucson Community on November 22, 1982, and replies by Golden State and Tucson FM on December 21 and 17, 1982, respectively; oral argument was held on January 27, 1983. Based on our review of the record, as refined by the written and oral arguments, we adopt the ALJ's findings of fact, and affirm his conclusion that Commission policy and precedent justify a grant of Tucson FM's application. See paras. 14–15 below.

2. *Diversification of Control of the Media of Mass Communications*. Golden State argues that the diversification preference awarded Community and Tucson FM by the ALJ (I.D. paras. 8, 33) should be reduced from a "substantial" to a "minor" one, because its Station KHYT, South Tucson, is only a small 500 watt AM station situated in a market served by 5 television stations, over 30 radio stations, and eight newspapers and penetrated to some extent by cable and MDS systems. It contends that the "explosion in media outlets" since the Commission wrote its *Policy Statement on Comparative Broadcast Hearings*, *supra*, undercuts the importance of the preference and that the result of the I.D. is to "automatically disadvantage" Golden State as an existing licensee contrary to the holding in *Miner* v. *FCC*, 663 F.2d 152 (D.C. Cir. 1980). We disagree. Long-standing precedent teaches that an applicant with no attributable ownership interests in the mass media is entitled to a substantial comparative preference under the diversification criterion over a competing applicant that already owns a broadcast station in the proposed community of license—despite the abundance of other media in the market—because it will provide a "new voice." See cases discussed in *Communications Properties, Inc.*, 92 FCC 2d 45, 52 RR 2d 981, 983 (Rev. Bd. 1982). The existence of the other media diminishes somewhat the weight accorded the diversification preference, but does not reduce the magnitude of the preference to less than "substantial." *Id.*; *see also Van Buren Community Service*, 87 FCC 2d 1018 (Rev. Bd. 1981) (substantial preference awarded applicant with no interests over the licensee of 500 watt daytime station in community).

3. To the extent that Golden State argues that we should deviate from the *Policy Statement*, *supra*, which emphasizes the significance of diversification, only the Commission has the authority to change old policy. *See Horne Industries, Inc.*, FCC 82R-68, 52 RR 2d 1009 (Rev. Bd. 1982). Finally, Golden State's claim that it has been "automatically disadvantaged" as that term is used in *Miner*, *supra*, because it already owns an existing station is rejected because the *Miner* case did not involve an existing licensee's application for an additional station but the special situation where a licensee seeks to move its existing operation to a new frequency. *See Gilbert Group, Inc.*, 88 FCC 2d 401, 405–406 (Rev. Bd. 1981).

4. Community argues that it should be awarded a diversification preference over Tucson FM because Tucson's proposed public affairs director and 2% stockholder, Charles Simms, owns 100% of a local broadcast production company that produces the minority-oriented program "Looking Black." That program is broadcast on 21 Arizona radio stations. Although it concedes that Simms' production company ownership does not amount to a "concentration of control adverse to the public interest," Community nevertheless claims that Simms "has unusually wide access to the Arizona media." Br. at 11, n.8. In *Morris, Pierce and Pierce*, 88 FCC 2d 713, 723–4 (Rev. Bd. 1981), *review denied*, FCC 83–31, released January 25, 1983, we indicated that we would not elevate a production company to the level of a medium of mass communications for comparative purposes absent evidence that such an interest in a particular case would undermine the objectives of diversification, *i.e.*, maximizing program services and viewpoints and preventing undue concentrations of economic power. While Simms' radio and television programs—which he stipulates he will continue to produce and disseminate on other local and regional broadcast outlets (Tr. 1354; 1396)—and his concurrent position as Tucson FM's public affairs director do raise some concerns about a redundancy of viewpoints, particularly minority viewpoints, his ownership interest in Tucson FM (2%) is *de minimis*. Hence, any diversification preference awarded to Community would be correspondingly *de minimis* and the matter is therefore non-decisional in this case. Were Simms' interest in, and control over the station greater, our concern would, of course, rise proportionately. Accordingly, we affirm the ALJ's evaluation of the diversification factors in this case. See I.D., paras. 8, 33.

5. *Full-time Participation of Ownership in Management.* At the time of hearing, Robert H. Scholz was a 93.05% stockholder of Golden State and was proposed to be in charge of the day-to-day operation of the station. I.D., paras. 9–10, 34. He died after the hearing ended but before the I.D. was issued. *Id.*, para. 10 n.8. Because Golden State had not yet proposed a substitution of an integrated owner-manager for the deceased Mr. Scholz by the time the I.D. was issued, the ALJ awarded no integration credit to Golden

State. *Id.*, paras. 34–5. In its exceptions Golden State points to its originally-proposed 93.05% integration proposal involving Mr. Scholz and seeks a remand, arguing that Scholz' death should not diminish its quantitative integration credit and that the Board should grant its October 22, 1982 petition for leave to amend to reflect the transfer on September 10, 1982 of Scholz' stock equally to Messrs. Allen Barry Witz and Frank Cihak, who will both be integrated into station management on a part-time basis (20 hours per week). (Br. 3–16.)

6. Golden State's petition for leave to amend will be granted. Commission precedent allows an applicant to substitute another stockholder for a deceased stockholder who had been proposed as an integrated owner and to maintain, but not increase, its quantitative integration credit. *Rose Broadcasting Co.*, 68 FCC 2d 1242, 1248–50 (1978); *Peoples Broadcasting Corp.*, FCC 83R-5, 52 RR 2d 1617, 1632 (Rev. Bd. 1983). Where, as here, the applicant wishes to apply this principle to include persons not previously part of the application—Messrs. Witz and Cihak—we believe, upon acceptance of the amendment, that further hearing would be required to allow cross-examination of their qualifications if the death of Mr. Scholz were a decisionally significant factor. *See Alexander S. Klein*, 86 FCC 2d 423, 435 (1981). Remand would be superfluous in this case, however, because Golden State's part-time integration proposal places it a distant third compared with the 52% and 50% full-time proposals of Community and Tucson FM, respectively. Therefore, while we accept Golden State's amendment, and credit it with 93.05% part-time integration, we deny its request for remand because that action would serve no useful purpose.

7. When the case was designated for hearing, Community was owned by 52% stockholder Thomas S. Rockler and his wife, Mary Ellen Rockler, who was a 48% stockholder. I.D., para. 11. Mr. Rockler is the proposed full-time general manager, news director, and public affairs director of the station, has lived in Tucson since 1972, is a member of the Chamber of Commerce, and acquired a small amount of broadcast experience while a student at the University of Kansas. *Id.* Community offered no evidence that Mrs. Rockler would have any duties at the station; although its application describes her as secretary, receptionist, and traffic clerk. *Id.*, para. 12. The Rocklers were legally separated on November 29, 1979. On April 25, 1980, Mr. Rockler obtained Mrs. Rockler's stock because Mr. Rockler believed his wife's physical and mental health would not permit her to function at the station. *Id.* The ALJ awarded Community 52% quantitative integration credit based on the conclusions that Community offered no evidence that Mrs. Rockler was proposed for a managerial role at the station and that the transfer of her stock to her husband therefore could not improve Community's integration proposal. *Id.*, para. 36. Tucson FM was

credited with 50% quantitative integration because 48% stockholder John W. Teal is proposed as full-time general manager who will be responsible for overall operation and management of the station and 2% stockholder Charles G. Simms is proposed as full-time public affairs director. I.D., paras. 13–15, 38. Its integration proposal was qualitatively enhanced by Teal's local residence since 1975, his past audio production work and his experience as an audio engineer and by Simms' local residence since 1979, his experience in radio show production, announcing, and audio direction, and his status as a member of a minority group.

8. Community claims that it should have been credited with 100% rather than 52% full-time integration credit, because Mrs. Rockler had owned 48% of its stock and was to be involved full-time in station affairs and that the subsequent transfer of her stock to Mr. Rockler was an involuntary action accompanied by a good cause showing (Br. 11–22).

9. In its June 29, 1979 amendment Community specified that "Thomas Rockler will work as manager, news director, and public affairs director." It also unequivocally stated that "Mary Ellen Rockler will work as receptionist, secretary, and traffic clerk." Mrs. Rockler's proposed duties, especially when considered with Mr. Rockler's explicit role as a manager, were without question wholly non-managerial and therefore not entitled to be accorded quantitative integration credit. *See Bradley, Hand and Triplett*, 89 FCC 2d 657, 661 (Rev. Bd. 1982). As the ALJ correctly found, Mrs. Rockler was never proposed for any role in station affairs in the evidence submitted at hearing. We recognize that on October 19, 1979, Community reported that Mrs. Rockler was physically and mentally unable to fulfill her commitment to work at the station and had filed for dissolution of her marriage. The amendment was accepted subject to the condition that Community could not improve its previous position. FCC 79M-1305, released November 6, 1979.

10. Under well established comparative practice the ALJ's ruling was correct and the amendment may not serve to increase Mr. Rockler's integration proposal from 52% to 100%. First, he was entitled to no more than 52% credit before the amendment was filed (para. 9 above). To now recognize its claimed 100% credit would be to allow an impermissible comparative upgrading, *see Birmingham Family Television, Inc.*, FCC 82R-59, 52 RR 2d 525 (Rev. Bd. 1982). While substitution because of the death of a principal is permitted, Community has cited no case where an applicant's decision to withdraw a principal because of divorce, legal separation, or an

inability to effectuate an integration proposal has ever been considered an "involuntary" act. *Id.*[1]

11. As to Community's other arguments, the record shows that the ALJ did not in fact make any binding "on-the-record determination" that Community would receive 100% credit—he determined only that Community would be permitted to introduce in its Exh. 1 evidence concerning the transferred 48% interest and could press its claim for 100% credit in its proposed findings and conclusions. Tr. 475–500. The ALJ specifically stated that he disagreed with Community's legal position concerning the 48% interest, Tr. 483, and that the question of the "voluntariness or involuntariness" of the transfer was "irrelevant," Tr. 499. Also, Community is mistaken in its assertion that the ALJ (at Tr. 494–5) prevented Mr. Rockler from testifying on the 48% interest. Instead, he refused to let him supplement by direct oral testimony the description of his own managerial duties in Community Exh. 1. Mr. Rockler has been fully credited for his managerial role and for his own 52% interest in the applicant. In any event for the reasons set out above, as a matter of law Community would not be entitled to more than 52% credit even had it submitted additional oral testimony on its integration proposal. No purpose would be served by granting Community's request for a remand to present evidence on the remaining 48% interest. Community's assertion regarding unfair additional cross-examination is not decisional because the award to it of lesser integration credit was based on the legal insufficiency of its proposed amendment and not on the extent of cross-examination it underwent.

12. On quantitative integration grounds, Community, with positive control, 52% ownership participating full time in station management, is slightly ahead of Tucson FM with negative control, 50% credit. Tucson FM, however, has a qualitative edge because of its minority ownership (2%) will participate full time in station management and these applicants' other qualitative attributes (local residence, civic participation, and broadcast experience) are offsetting. Tucson FM's qualitative advantage is sufficient to offset Community's slight quantitative edge, which is less than a "clear" one, *Cannon's Point Broadcasting Co.*, FCC 83R-22, released March 29, 1983, para. 11; *WHW Enterprises, Inc.*, 89 FCC 2d 799, 817 (Rev. Bd. 1982). In sum, Community and Tucson FM are equal under the integration factor and each has a moderate preference over Golden State, which has 93.05% part-time (20-hour) credit.

13. *Comparative Coverage.* Tucson FM would bring a first service to 5,564 more persons who now receive no aural service at night and

[1] Community does not rely on the Commission's doctrine of attribution of spousal interests (Tr. 3086–7). *See Absolutely Great Radio, Inc.*, FCC 83R-9, 53 RR 2d 97, 99–102 (Rev. Bd. 1983). Nor could it. *Id.*, n.13.

to 2,032 more square miles. On the other hand, the other applicants would provide a greater nighttime second service involving 709 more square miles and 2,600 more persons who currently receive only one nighttime aural service. Golden State and Community except to the significance of Tucson FM's preference, noting that the number of underserved persons who will receive additional service is small in relation to the entire population that will be served.

14. We affirm the ALJ's award to Tucson FM of a decisive comparative coverage preference that is characterized as moderate. Longstanding precedent establishes that the provision of a *first* service to a substantial number of people is a coverage factor entitled to great weight and is of a higher priority than the provision of a choice of services. *Radio Cincinnati, Inc.* v. *FCC*, 117 F.2d 93, 95, 5 RR 2035, 2039–2040 (D.C. Cir. 1949); *RAM Enterprises*, 57 FCC 2d 844, 853 (Rev. Bd. 1976). Tucson FM's preference is somewhat offset because its competitors provide a second service at night to a larger population, and because the number of persons receiving a first service from Tucson FM (5,564) is not as large as in *RAM*. Thus, Tucson FM's preference is moderate, not substantial. *Cf. Communications Properties, Inc., supra*, 52 RR 2d at 984; *Town and Country Radio, Inc.*, 70 FCC 2d 572, 575 (Rev. Bd. 1978). We do agree with the ALJ that the provision of a first nighttime service here to over 5,000 people remains the most significant distinction in this otherwise razorthin comparative contest between Tucson FM and Community and is therefore decisive.[2]

15. *Final Comparative Evaluation.* On the diversification and integration factors, Tucson FM and Community are clearly superior to Golden State, which therefore finishes last comparatively. Tucson FM has been awarded a moderate comparative coverage preference. Community has a slight auxiliary power preference (I.D., para. 40), and Tucson FM has a minor comparative demerit, as a result of faulty ascertainment and to which no exception has been taken (I.D. para. 45). In weighing these factors, as the ALJ noted, Tucson FM's coverage preference is by far the most important difference between the applicants because it will mean the inauguration of a first FM broadcast reception service to significant numbers of people. Thus, it easily overcomes Tucson FM's minor demerit and Community's slight preference for auxiliary power. We therefore affirm the ALJ's

[2] We do not credit Community's argument that an intent to withhold relevant comparative information, an employment agreement, should have been inferred by the ALJ and a Section 1.65 demerit assessed against Tucson FM. (Br. 25–26). The information, which was favorable to the applicant, was voluntarily reported after a brief 30 day delay. The ALJ found no evidence of intent to deceive and correctly concluded that the short delay in reporting "is *de minimis* and no comparative demerit is assessed." I.D., para. 43. *See Washington Association for Television and Children* v. *FCC*, 665 F.2d 1264 (D.C. Cir. 1981); *Webster-Baker Broadcasting Co.*, 88 FCC 2d 944, at para. 5, 50 RR 2d 1142 (Rev. Bd. 1982)

conclusion that a grant of Tucson FM's application will best serve the public interest.

16. ACCORDINGLY, IT IS ORDERED, That the petition for leave to amend filed by Golden State Broadcasting Corp. on October 22, 1982, IS GRANTED, and the amendment IS ACCEPTED; and that its petition for leave to tender amendment, filed October 12, 1982, IS DISMISSED as moot; and

17. IT IS FURTHER ORDERED, That the application of Tucson FM Broadcasting Corporation (File No. BPH-10,347) IS GRANTED, and the applications to Golden State Broadcasting Corp. (File No. BPH-10,041) and Tucson Community Broadcasting, Inc. (File BPH-10,345) ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION
JOSEPH A. MARINO, *Chairman, Review Board*

FCC 82D–67

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
GOLDEN STATE BROADCASTING CORP. Tucson, Arizona	BC Docket No. 79–56 File No. BPH-10,041
TUCSON COMMUNITY BROADCASTING, INC. Tucson, Arizona	BC Docket No. 79–58 File No. BPH-10,345
TUCSON FM BROADCASTING CORPORATION Tucson, Arizona	BC Docket No. 79–59 File No. BPH-10,347

Appearances

Maurice Barnes and *Michael Foudy* on behalf of Golden State Broadcasting Corp.; *Carl Fielstra*, *James Gammon*, and *Mark Amerman* on behalf of Tucson Community Broadcasting, Inc.; *Richard Helmick* and *Stanley Neustadt* on behalf of Tucson FM Broadcasting Corporation; and *Brian Kilbane* on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE
FREDERIC J. COUFAL

(Issued September 15, 1982; Released September 22, 1982)

Preliminary Statement

1. By memorandum opinion and order, FCC 79–186, 44 Fed. Reg. 21077, released April 3, 1979, the Commission designated the above-captioned mutually exclusive applications (and the applications of Great Southwest Communications, Inc. and Old Pueblo Broadcasting Corporation—both later dismissed pursuant to settlement agreements[1]) for hearing[2] upon the following issues:

[1] FCC 81M-835, released March 23, 1981 and FCC 81M-2421, released August 5, 1981.

[2] Golden State Broadcasting Corp. will be referred to henceforth as Golden State, Tucson Community Broadcasting, Inc. as TCB, Tucson FM Broadcasting Corporation as Tucson FM, Great Southwest Communications, Inc. as GSW, and Old Pueblo Broadcasting Corporation as Old Pueblo.

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in the light of the evidence adduced pursuant to the foregoing issue, which of the applications should be granted.

The order permitted evidence to be adduced relative to the areas and populations to be served by each applicant to determine whether a comparative preference should accrue to any of them.[3]

2. In an order (FCC 79M-1302) released November 5, 1979, the following issues were added:

(a) To determine, for comparative purposes, whether Tucson FM Broadcasting Corporation complied with Section 1.65 of the Commission's Rules in failing to report to the Commission any inability of Sarah S. Grace to fulfill her financial commitment to that applicant prior to its amendment filed April 2, 1979.

(b) To determine, for comparative purposes, whether and to what extent the circumstances leading to the Commission's Memorandum Opinion and Order released February 9, 1979 *In the Matter of Liability of Golden State Broadcasting Corp., Licensee of Radio Station KHYT, Tucson, Arizona,* reflect on Golden State Broadcasting Corp. as a Commission licensee.

(c) To determine, for comparative purposes, whether Golden State Broadcasting Corp. complied with Section 1.65 of the Commission's Rules with respect to its reporting of its loss of a transmitter site on land owned by the Anamax Mining Company.

(d) To determine, for comparative purposes, with respect to Old Pueblo Broadcasting Corporation during those parts of the years 1975 through 1978 in which Peter M. Marcus was the controlling stockholder and president of the licensee of station WWCO, whether that station complied with its obligation to document its ascertainment efforts.

(e) To determine with respect to Tucson Community Broadcasting, Inc., the source and availability of the funds that Tucson Community Broadcasting, Inc. will need to construct its proposed station and to operate it for three months; the changes, if any, in the estimate of operating costs occasioned by the possible loss of the services of Mary Ellen Rockler; and whether, in light of the evidence adduced under this issue, Tucson Community Broadcasting, Inc. is financially qualified.

(f)(i) To determine the location of the proposed 3.16 mV/m and 1.0 mV/m contours of the applicants in this proceeding.

(f)(ii) To determine, on a comparative basis, the areas and populations of the respective 3.16 mV/m and 1.0 mV/m contours which may be reasonably expected to receive actual service from the applicants' proposed operations.

(f)(iii) In the event that proof under issues (f)(i) and (f)(ii) establishes that an

[3] The order (at footnote 3) also authorized the resolution of differences in the effective radiated power (ERP) specified by the applicants proposing transmitter sites in the Santa Catalina Mountains in order to conform to the requirements of the United States-Mexican Agreement. The Bureau proposed a resolution of the matter (Tr. 35) and the applicants with Santa Catalina sites changed their respective ERP's to conform to the Agreement. See the letter from TCB dated October 4, 1979 and the June 8, 1979 amendment by Golden State which specified a new transmitter site.

applicant will bring actual service to areas and populations not served by its competitors, to determine the number of services, if any, presently available to such areas and populations.

In an order (FCC 80M-632) released April 16, 1980, summary decision was granted in favor of TCB on the financial issue specified against it.

3. By order (FCC 80M-2146) released October 28, 1980, the following issue was added:

To determine whether Peter Marcus violated Section 1.65 of the Commission's Rules by failing to report within 30 days understandings and agreements that he had reached with Alva B. Torres and Barbara Z. Marcus whereby they were to acquire interest in his application and to participate in the proposed station operations and if it is found that Peter Marcus did violate Section 1.65 to determine the effect of such violation on Old Pueblo Broadcasting Corporation's comparative qualifications.

4. An order (FCC 80M-2147) released October 28, 1980, added the following issues:

To determine whether Great Southwest Communications, Inc. conducted an improper investigation of Mary Ellen Rockler and thereby harassed and Tucson Community Broadcasting Corporation.

To determine whether, in light of the evidence adduced under the foregoing issue, Great Southwest Communications, Inc. possesses the requisite basic and comparative qualifications to serve as a Commission licensee.

Those issues were amended in an order (FCC 81M-1798) released June 11, 1981 to be as follows:

To determine whether Great Southwest Communications, Inc., Tucson FM Broadcasting Corporation, and/or Old Pueblo Broadcasting Corporation conducted an improper investigation of Mary Ellen Rockler and thereby harassed her and Tucson Community Broadcasting Corporation.

To determine whether, in light of the evidence adduced under the foregoing issue, whether Tucson FM Broadcasting Corporation and/or Old Pueblo Broadcasting Corporation possess the requisite basic and comparative qualifications to serve as a Commission licensee.

5. Hearing sessions were held on April 24, April 30, May 1, 5–8, 12–14, September 15, 22–23, and October 28, 1980; and June 17–19 and July 6, 1981. Tucson FM, the party with the burden of proceeding and of proof, elected to present no evidence relating to issues (f)(i), (f)(ii), and (f)(iii) (Tr. 2183). The hearing record was closed by order released September 14, 1982 (FCC 82M-2808).

Findings of Fact

Harassment Issue

6. Thomas S. Rockler, an officer, director, and stockholder of TCB, testified on May 1, 1980 (TCB Ex. 1; Tr. 486 *et seq.*). Mr. Rockler said that he had acquired his wife's 48% interest in TCB because she had been mentally ill for a long time, had been under psychiatric

care for a number of years, was then in a hospital, had made attempts at suicide, and was not then capable of holding a responsible position (Tr. 501–502).[4] Mr. Tillotson, counsel for GSW, heard Mr. Rockler and concluded that since it was to TCB's benefit respecting integration credit that Mrs. Rockler's disassociation from TCB be shown to be involuntary, the condition of Mrs. Rockler bore investigation (Tr. 2498).[5] Tillotson talked to GSW's Tucson counsel, Mr. Caldwell, about the interview. Caldwell recommended that his legal assistant, Ms. Mezzatesta, conduct the interview because she was a woman, a non-lawyer, and a competent interviewer (Tr. 2476–2477). Tillotson told Caldwell about the statements Rockler had made about his wife's health and instructed Caldwell to approach the matter with sensitivity and to drop the interview if Mrs. Rockler seemed unable to emotionally deal with the questioning (Tr. 2480). Before Caldwell was asked to proceed, Tillotson discussed the plan with counsel for Old Pueblo and for Tucson FM; the former helped plan the interview and the latter thought the approach "interesting" and asked to be advised of the result (Tr. 2474–2475; TCB Ex. 4). Neither Mrs. Rockler nor Mezzatesta testified and there is no competent direct evidence of a telephone call involving those two persons.[6] However the fact that there was a call from Mezzatesta to Mrs. Rockler on August 12, 1980, pursuant to Tillotson's direction, is undisputed (Tr. 2477).

7. At about 7 p.m. on the evening of the day of the call, Mr. Rockler saw Mrs. Rockler and found her to be troubled and emotionally unstable. This was a change in her condition. The recent weeks had been a time of improvement during which she had not shown signs of being troubled or of emotional instability. He left Mrs. Rockler and at about 9 p.m. she called him and asked him to come to her home. He did so and found her to be pale, distraught, agitated, and nervous. She had the appearance of being drugged and he discovered she had taken an overdose of sleeping and antidepressant medications and had drunk a bottle of wine and some beer. She had a bloody cut on her wrist and Mr. Rockler found some bloody glass which he believed had been used by her to cut her wrist. He took her to a hospital and told attending nurses what he thought she had taken and they induced vomiting (TCB Ex. 5). The wrist wound required no stitches (Tr. 2820). She was discharged the next day (Tr. 2712–2713). Mrs. Rockler has refused to give an affidavit relative to

[4] TCB counsel had previously advised that Mrs. Rockler was, on April 24, 1980, in a mental institution (Tr. 247).

[5] Tillotson knew that Mr. Rockler purchased Mrs. Rockler's stock after designation (TCB Ex. 1) and that TCB claimed that integration credit should be given Mr. Rockler for that ownership because the transfer was involuntary (Tr. 486–499).

[6] GSW did file a pleading to which was attached Mezzatesta's account of the call (TCB Ex. 4).

the events of August 12, 1980 or to permit her doctor to testify. She is sensitive to inquiries about her condition (TCB Ex. 4).

Diversity

8. Golden State owns 100% of standard broadcast station KHYT, which is licensed to South Tucson, Arizona (Tr. 299). South Tucson is about 1 square mile in size, has a population of 7,000 to 8,000 people, and is completely encompassed by the city of Tucson, Arizona (Tr. 308). Neither TCB nor any of its principals has an interest in any mass communications medium (TCB Ex. 1). Tucson FM owns no interest in any medium of mass communications. Charles Simms, who owned 4% of Tucson FM's stock at the time this matter was designated, and who now owns 2% thereof (order, FCC 81M-2422),[7] owns Patronus Productions, a company which produces "Looking Black," a program series relating to the black community which is broadcast on 21 Arizona radio and several television stations. No other principal of Tucson FM owns any interest in any medium of mass communications (Tucson FM Ex. 19).

Integration

9. Golden State, at the time of designation, was organized as follows:

Stockholder	*Residence*	*Percentage of Shares*	*Director*	*Office*
Robert H. Scholz	Tucson	93.05	yes	President
Willie R. Adams*	Tucson	1.38	yes	Vice President
Johnny Bowens*	Tucson	1.38	yes	--
Richard N. Russell	Tucson	1.38	no	--
Walter T. Hopkins	Tucson	1.38	no	--
John T. Anderson	Tucson	1.38	no	--
Elka Cox	Tucson	--	yes	Secretary/ Treasurer
Laurie Fagin	Tucson	--	yes	Vice President
William A. Youdelman	Los Angeles	--	yes	Vice President
Robert W. Morgan	Los Angeles	--	yes	Vice President
J.R. Scholz	Anaheim	--	yes	Vice President
Geneva Scholz	Anaheim	--	yes	Vice President
Michael L. Foudy	Tucson	--	yes	--
John W. Emerson	Tucson	--	yes	--

*spouse is co-owner of stock

Golden State stock is 7% minority owned; 27% of the directors are female and 27% are members of a minority group; 29% of the officers are women and 27% are members of a minority group (Golden State Ex. 1).

10. Robert H. Scholz was the only stockholder proposed to be

[7] Approving petition for leave to amend filed July 6, 1981.

integrated into management. He was to be in charge of the day-to-day operation of the station. Scholz lived in Tucson from 1966 until his death on July 19, 1981.[8] He operated and was majority stockholder in station KHYT-AM in South Tucson during that period. Scholz was a member of the Southside Optimist Club, a director of Tucson Desert Museum, and a member and officer of Tucson Broadcaster's Association. In 1976 Scholz assisted in the establishment of the Pima County Victim-Witness Advocate Program to provide assistance to victims of crime. He developed programming for that endeavor and solicited other broadcasters to help in the effort. Prior to coming to Tucson, Scholz worked in several radio stations in various capacities (Golden State Ex. 4).

11. When the designation order issued, Thomas S. Rockler was president, director, and 52% owner of the stock of TCB. His wife, Mary Ellen Rockler, was then owner of 48% of the stock. Mr. Rockler proposes to be full-time general manager, news director, and public affairs director of the station. He has lived in Tucson since 1972 and is a member of the Chamber of Commerce. Mr. Rockler broadcast news and had a music program on the University of Kansas station while he was a student of radio and television in 1964, 1970, and 1971 (TCB Ex. 1).

12. TCB offered no evidence as to what duties, if any, it was contemplated that Mrs. Rockler might have at the station.[9] Thomas Rockler acquired Mrs. Rockler's stock on April 25, 1980 because Mr. Rockler felt that his wife's physical and mental condition would not permit her to function at the station. Mr. and Mrs. Rockler had entered into a legal separation agreement on November 29, 1979 (TCB Ex. 1; Tr. 621-622).

13. At the time of the designation order, John W. Teal was 52% owner, president, and director of Tucson FM, and Charles G. Simms was a 4% owner, secretary/treasurer, and director of the corporation (Tr. 1077, 1350-1351). An order (FCC 81M-2421), released August 5, 1981, approved a settlement agreement between Tucson FM and Old Pueblo (and dismissed the Old Pueblo application), whereby Old Pueblo shareholders would acquire ownership rights to 50% of Tucson FM stock; a second order (FCC 81M-2422) of the same date accepted an amendment which reduced the ownership interests of Teal to 48% and of Simms from 4% to 2%.

14. Teal proposes to work 40 hours per week as general manager and to be responsible for the overall operation and management of the FM station. He has resided in Tucson since 1975 (Tucson FM Ex.

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[8] This occurred after the hearing ended and there is no direct evidence of it. However the fact is undisputed (Golden State Reply Findings, p. 2; Tucson FM Reply Findings, p. 7; TCB Findings, p. 14, fn. 10).

[9] The application indicates she was to be secretary, receptionist, and traffic clerk (amendment filed June 29, 1979, Ex. III-A, p. 2).

17, p. 5). He has no broadcast experience but has participated in production work for live audio recordings and studio productions for radio commercials and has done private consulting in audio engineering and audio production (Tucson FM Ex. 17, pp. 1–2; Tr. 1194–1196, 1199–1201, 1240).

15. Simms, a Black, proposes to work 40 hours per week as the public affairs director of the proposed station. Since 1976 Simms, under the name of Patronus Productions, has produced in Tucson the program series entitled "Looking Black" (Tucson FM Ex. 19, p. 2; Tr. 1394–1398). He has been a resident of Tucson since 1979 and is not an active member of any local organization. In connection with the production of "Looking Black" he has promoted and become familiar with the activities of many local Tucson civic, cultural, minority, and public welfare groups (Tucson FM Ex. 19, pp. 3–4; Tr. 1383). From 1971 to 1979 Simms had experience as an announcer and audio director for radio and television broadcast stations (Tucson FM Ex. 19, pp. 1–2).

Comparative Coverage

16. Golden State and TCB have specified essentially the same transmitter site on Mt. Bigelow. Tucson FM proposes to operate from another site (Joint Ex. 2, pp. 3–4). Tucson has ten existing full-time aural transmission facilities and one existing daytime aural transmission facility (Joint Ex. 2, pp. 5, 10–11). Since the two Mt. Bigelow applicants have essentially the same facilities, their coverage, tabulated below as Mt. Bigelow, is deemed identical. Tucson FM's coverage will differ as shown below (Joint Ex. 2, pp. 2–3, 7–10):

	Primary Service Area	
Applicant	*(Square Miles)*	*Population*
Tucson FM	10,224	557,255
Mt. Bigelow	8,614	542,606

17. During the day there are five or more services available to almost the entire area proposed to be served by both Tucson FM and the Mt. Bigelow applicants. The exception is the town of Willcox (population 2,568), which receives only one FM and two AM services. The Mt. Bigelow applicants will provide a fourth daytime service to Willcox. Tucson FM will not (Joint Ex. 2, p. 6; Tr. 2200).

18. At night areas and populations to be served and existing services are as follows (Joint Ex. 2, pp. 7–9):

	Tucson FM		*Mt. Bigelow*	
	Area		*Area*	
Services	*(Square Miles)*	*Population*	*(Square Miles)*	*Population*
0	4,801	23,488	2,769	17,924
1	2,485	31,883	3,194	34,483
2	1,118	7,641	1,612	8,635

3	191	3,002	183	2,876

Sarah Grace-Tucson FM Reporting Issue

19. On March 20, 1978 Sarah Grace (sometimes Sarah Grace Langs) agreed to lend $342,058 to Tucson FM for construction and operation of the proposed station. The funds were to come to her as a loan from her broker secured by stocks in his possession owned by her (Old Pueblo Ex. 8). By late 1978, Grace had suffered some personal problems and financial reverses which caused her to decide to withdraw as financial backer; she wrote to John Teal asking that someone else be found to take her place (Tr. 2240–2241). In a December 12, 1978 letter from her attorney to the local attorney for Tucson FM the latter was advised, *inter alia*, that Grace then felt it in her interest to withdraw her financial support. The letter went on to say that the writer would advise Tucson FM's Washington counsel of the Grace decision and request that he advise FCC (Old Pueblo Ex. 9). The response by Tucson FM's local counsel was to the effect that Grace had no legal right to withdraw her loan commitment (Old Pueblo Ex. 10).

20. Grace testified that she had not read the December 12, 1978 letter before it was sent though she had discussed the matter with her counsel and the letter seemed "terribly tough." She did not intend to withdraw her support until a substitute had been found and that she would feel morally and legally obliged to advance the amount she had committed if a license had been granted to Tucson FM (Tr. 2258–2260). She had securities on deposit with her broker which would have enabled her to do so (Tucson FM Ex. 21; Tr. 2279–2280).

21. Tucson FM principals found a substitute for Grace on March 28, 1979 (Tr. 1221–1222). An amendment so showing was filed April 2, 1979 (order, FCC 79M-1051).

Old Pueblo Reporting Issue

22. The Old Pueblo application was, as originally filed, the application of Peter Marcus. On March 12, 1979 the application was amended to show that Old Pueblo had replaced Peter Marcus as applicant and that Peter Marcus, Barbara Marcus, and Alva Torres were the stockholders, directors, and officers of the new applicant (TCB Ex. 2).

23. Barbara Marcus, wife of Peter Marcus, had wanted an active role in the station since the application was filed in 1976 and had discussed it with him (Tr. 1417–1418). Mrs. Marcus helped with ascertainment surveys at times earlier than January 1979 and helped plan community leader surveys which began on January 11, 1979 (Tr. 1437). She conducted community leader surveys and believed she had to be a stockholder in order to do that (Tr. 1437, 1441–1443).

24. Alva Torres first met Peter Marcus when he was conducting ascertainment surveys in Tucson in January 1979 (Tr. 1648). A couple of days later Marcus spoke to her about joining the applicant (Tr. 1652). By January 31, 1979 Torres and Mr. Marcus had agreed that Torres would be an officer, director, and shareholder of the corporation (Tr. 1656). Torres' best recollection was that the agreement came in early January 1979 (Tr. 1659).

WWCO Ascertainment Documentation Issue

25. The parties stipulated that during 1976-1978 there were 28 interview reports which were completed and placed in the public file of WWCO which (a) were not signed by the interviewer, (b) did not have any indication as to the position of the interviewer, and (c) did not have any indication intelligible to the public that the report was reviewed by anyone in station management. It was also stipulated that there were 22 other reports completed during the same period that (a) were neither signed by the interviewer nor dated, (b) contained no indication of the position of the interviewer, and (c) contained no indication intelligible to the public that the report was reviewed by anyone in station management. During the same period, there were 30 further interview reports in the WWCO public file which were signed but not dated and did not contain any indication as to the interviewer's position or any indication that the report was reviewed by management (Tr. 1888). All of the interviews mentioned were taken after the effective date of *Primer on Ascertainment of Renewal Applicants*, released January 7, 1976 (Tr. 1889-1890).

KHYT Forfeiture Issue

26. On February 9, 1979, the Chief of the Broadcast Bureau assessed a $1,000 forfeiture against station KHYT. The fine concerned the station's failure to identify the person paying for certain broadcast announcements carried in November 1977 (Old Pueblo Ex. 17). At the time of the alleged violations, Robert H. Scholz, president of Golden State, controlled station KHYT (Tr. 431). Although Golden State paid the forfeiture, Scholz said he felt there had been no violation of the rules (Tr. 462). Golden State offered no further evidence on this issue.

Golden State Site Loss Reporting Issue

27. Golden State originally proposed as its transmitter site property owned by Anamax Mining Company (Anamax) (Tr. 343–344). Golden State's reliance upon use of the site was based upon a letter dated October 15, 1976 from Dale F. Kittel, director of land management, Anamax, to William A. Youdelman, a vice president of Golden State (Tucson FM Ex. 23). Kittel's letter said that "we believe that a reasonable arrangement can be made respecting fees charged as rentals, permission for access and other related matters."

28. By letter dated January 31, 1979, D. R. Russell of Anamax wrote Youdelman that Anamax had no sites available for either lease or purchase (Tucson FM Ex. 24). This letter came to Golden State and was forwarded unopened to Youdelman, who was no longer with Golden State, at his last known address in California. The letter was subsequently returned to Golden State as undelivered and was opened and shown to Scholz sometime in mid-March 1979 (Tr. 379–380, 403, 369, 384–385, 390–391).

29. Golden State attempted to negotiate with Anamax during March-April 1979 to effectuate a retraction of the January 31, 1979 letter (Old Pueblo Ex. 21, p. 4; Tr. 395–402). Golden State's counsel informed Scholz on May 1, 1979 that the negotiations with Anamax had been fruitless (Old Pueblo Ex. 21, p. 4). By letter dated May 7, 1979, Golden State notified the Commission and the parties that it had lost its proposed transmitter site (Old Pueblo Ex. 21, p. 5).

Emergency Power

30. Only TCB proposes an emergency power service at its transmitter site (Tr. 497).

Conclusions of Law

Harassment

31. With resolution of the financial issue designated against TCB in that applicant's favor, the only qualifying matter to be resolved is the harassment issue against GSW, Tucson FM, and Old Pueblo. At the outset, it is noted that Mr. Tillotson, counsel for then applicant GSW, discussed with counsel for then applicant Old Pueblo, Tillotson's inclination to ask questions of Mrs. Rockler respecting her relationship with and withdrawal from TCB and that counsel for Old Pueblo made suggestions as to how this should be accomplished. It is inferred that Old Pueblo was interested in and intended to share in any favorable outcome. Tillotson also advised counsel for Tucson FM of his intention. Counsel expressed an interest in hearing the outcome. It is inferred that Tucson FM also intended to share in a favorable result. These circumstances, and the fact that Old Pueblo's stockholders later gained a 50% interest in Tucson FM, require that there be imputed to Tucson FM a share of the responsibility for the interview.

32. At the time the call to Mrs. Rockler was made, Mr. Rockler had testified that he had acquired his wife's interest in TCB. It was apparent that since Mr. Rockler had increased his ownership in TCB from 52% to 100%, the circumstances surrounding Mrs. Rockler's withdrawal from the corporation might be important to the integration credit to be given TCB for Mr. Rockler's participation. Indeed, TCB had expressly claimed that the withdrawal was involuntary and that therefore Mr. Rockler should be credited with 100% integration

for comparative purposes. In addition, TCB had provided no testimony by Mrs. Rockler nor any medical evidence with respect to her condition. TCB's competitors were left with Mr. Rockler's unsupported lay testimony as to her condition. In those circumstances it was reasonable for any party to attempt to learn facts with respect to Mrs. Rockler's withdrawal. This was difficult because Mr. Rockler had said that Mrs. Rockler was mentally ill and had been suicidal. Because of this claim, Tillotson endeavored to arrange that the interview would be circumspectly handled and the interviewer was instructed to terminate the inquiry on any signs of distress. There is no evidence that the interviewer acted with insensitivity toward Mrs. Rockler or that Mrs. Rockler indicated any upset to the interviewer. The evidence respecting the interview and the succeeding matters concerning Mrs. Rockler is skimpy. While recognizing that TCB's position respecting proof may have been difficult, it, nonetheless, had the burden. The conduct of GSW in interviewing Mrs. Rockler was not shown to be such that any party which shares in the responsibility therefore should be disqualified.

Diversity

33. Under *Morris, Pierce & Pierce*, 88 FCC 2d 713, 50 RR 2d 959, a production company is not considered a medium of mass communications for the purpose of comparative evaluation.[10] Thus Tucson FM suffers no demerit for Simms' ownership of such a company. Neither TCB nor any principal thereof has an ownership interest in any medium of mass communications. Golden State owns an AM station in South Tucson, a city completely surrounded by the proposed city of license. Thus Tucson FM and TCB each have a substantial comparative preference over Golden State with respect to the diversification criterion.

Integration

34. At the time of the hearing, Robert H. Scholz the then 93.05% owner of Golden State, was proposed to be in charge of the day-to-day operation of the station. Scholz was a long-time resident of Tucson and a local broadcaster with many years' experience. There was no other person proposed for integration. It is Golden State's was no other person proposed for integration. It is Golden State's view that notwithstanding Scholz' death, it is entitled to integration credit for his proposed participation because the transfer of his stock from him was involuntary. Golden State relies on *Mid-Florida Television Corp.*, 76 FCC 2d 158, 46 RR 2d 1503, and other cases which are to the effect that an involuntary transfer of ownership after designation permits the applicant involved to maintain but not to improve its integration proposal.

[10] Absent specific proof not developed here.

35. But those cases involve situations where the applicant's integration proposal was improved by reason of the involuntary transfer and not where the proposal was diminished or lost. No cases involving the latter situation have been cited. The whole matter of integration credit has to do with selection of the applicant which will best function in the public interest.[11] There is no benefit to the public in awarding a license to an applicant with a proposal rendered impossible by the death of a principal. Golden State, since the death of Scholz, has no integration proposal. the death of Scholz, has no integration proposal.

36. TCB, in its application, proposed that Thomas Rockler, its 52% stockholder, would be full-time general manager, news director, and public affairs director. After designation, but prior to hearing, Mr. Rockler acquired the 48% of TCB owned by his wife. The voluntariness of the transfer is argued by the parties as is the question of whether Mrs. Rockler's participation was ever significant enough to be worthy of integration credit. TCB offered no evidence as to any proposed participation in station affairs by Mrs. Rockler. Thus at designation there was a 52% integration proposal and any transfer of Mrs. Rockler's stock to her husband, whether voluntary or involuntary, could not improve TCB's integration proposal. See *Mid-Florida Television Corp., supra*, and cases there cited.

37. Mr. Rockler has been a Tucson resident since 1972 and is a member of the Chamber of Commerce of that city. He broadcast news and had a music program on the University of Kansas station while a student before 1972.

38. At desgination time, John W. Teal owned 52% of the stock of Tucson FM and Charles G. Simms owned 4%. The balance was owned by Sarah Grace who, after designation, sold her stock to Teal. Thereafter the settlement agreement between Tucson FM and Old Pueblo diminished Teal's stock ownership to 48% and Simms' to 2%. Teal proposes to work 40 hours per week as a general manager of the station and Simms proposes full-time work as the public affairs director. Credit for Teal is enhanced by local residence, some audio production work, and by his experience as an audio engineer. Simms' credit is enhanced because he is a member of a minority group, has experience in the production of radio shows, resides in Tucson, and has several years' experience as an announcer and audio director for broadcast stations.

Comparative Coverage

39. Tucson FM enjoys a significant advantage because it would bring a first nighttime service to 5,564 more people and to an area of

[11] The rule against comparative improvement after designation considers another public interest aspect of the comparative process, that of the elimination of a scramble to improve position until the day the decision is final.

2,092 more square miles than will either TCB or Golden State. The advantage is clearly Tucson FM's even though TCB and Golden State would serve the town of Willcox (population 2,568) with a fourth daytime service and Tucson FM would not reach that community. See *RAM Enterprises, et al.*, 57 FCC 2d 844, 35 RR 2d 1507.

Miscellaneous Matters

40. TCB enjoys a minor comparative credit because it is the only applicant which proposes an emergency power generator.

41. Chargeable to Tucson FM are any comparative demerits by reason of any failure to report respecting Sarah Grace, any failure by Peter Marcus to report Old Pueblo's employment arrangements with Barbara Marcus and Alva Torres, any deficiencies in the ascertainment efforts of WWCO, and any demerits resulting from any harassment of Mrs. Rockler.

42. While it is clear that Grace formed the intent to withdraw her financial support from Tucson FM in the fall of 1977 and shortly thereafter so advised the other principals, she did not execute her intention until the latter part of March of 1978. She maintained the capacity to fulfill her commitment until then. The early April 1979 report of her withdrawal was well within the time constraints imposed by Section 1.65.

43. The evidence relating to the employment agreements reached by Peter Marcus with Alva Torres and with barbara Marcus indicates that by early January 1979, it had been settled that Alva Torres would be a part of the Old Pueblo operation and that by mid-January agreement had been reached with Barbara Marcus. Their employment was not reported until mid-March of the same year. It It is not shown that there was any intent to gain advantage by tardily reporting or that any could have been gained. Accordingly, the short delay is *de minimis* and no comparative demerit is assessed.

44. What has been previously said about the harassment matter is pertinent here. TCB, having the burden, has not shown conduct of such a nature as to provide support for a comparative demerit.

45. The records of WWCO clearly indicate wholesale deficiencies in at least recording ascertainment efforts. A minor comparative demerit is assessed against Tucson FM.

46. Golden State is chargeable for any demerit that may be appropriate by reason of the forfeiture paid by KHYT for violation of rule 73.1212 and for the alleged failure to timely report the loss of its FM transmitter site.

47. Golden State offered no evidence relative to the KHYT matter beyond a statement by Scholz that he did not believe there had been a violation of the rules. It does not appear that the same violation occurred over a long period of time or was one of a series of other violations. No demerit will be assessed.

48. The failure to report the loss of the transmitter site involves

a delay of a week or two beyond the 30 days prescribed in Section 1.65 after Golden State's counsel advised it of the finality of the Anamax position. The delay is not shown to have disadvantaged anyone or to have been designed to do so. The matter is *de minimis* and no demerit will be assessed.

Ultimate Conclusions

49. Golden State's diversity position and the unfortunate failure of its integration proposal place it clearly in last place in the comparative evaluation.

50. As between TCB and Tucson FM, the diversity criterion leaves no comparative difference because neither has an interest in any medium of mass communications. While the percentages of full-time integration of TCB and Tucson FM are close, 52% and 50%, respectively, and while there is authority that differences of an even greater amount are essential equality (52.63% and 60% in *The News-Sun Broadcasting Co.*, 24 FCC 2d 770, 777, 19 RR 2d 942), the particular percentages here mean the difference between positive and negative control. A small credit is therefore due TCB respecting quantitative integration. This credit is not, however, the clear quantitative difference referred to in *WHW Enterprises, Inc.*, 89 FCC 2d 799, 51 RR 2d 409, which may not be overcome by qualitative differences. Both applicants' integrated principals have Tucson residences and none have significant community involvement. But Tucson FM has a qualitative preference for the involvement of its 2% stockholder Simms, a Black, who is proposed to be full-time public affairs director, and for the greater broadcast experience of Simms than that of Rockler. There being only a small quantitative difference between Tucson FM and TCB, the qualitative difference gives Tucson FM a small integration preference.

51. The decisive factor is the Tucson FM preference for its superior coverage. It reaches an appreciably larger nighttime "white area" than does TCB. This comparative preference is easily sufficient to overcome Tucson FM's minor demerit for the WWCO ascertainment deficiencies and the small preference due TCB for its emergency generator.

Accordingly, IT IS ORDERED that unless an appeal from this Initial Decision is taken to the Commission by a party or the Commission reviews this Initial Decision on its own motion in accordance with Section 1.276 of the rules, the application of Tucson FM Broadcasting Corporation for a construction permit for an FM station in Tucson, Arizona IS GRANTED; the application of Golden State Broadcasting Corp. IS DENIED; and the application of Tucson

Community broadcasting, Inc. IS DENIED.[12]

FEDERAL COMMUNICATIONS COMMISSION
FREDERIC J. COUFAL, *Administrative Law Judge*

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[12] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Rule 1.276(d).

Common Carrier, Mergers and Acquisitions

Order adopted granting transfer of control of Southern Pacific Communications Company and Southern Pacific Satellite Company's licenses and authorization to GTE Corporation.
–GTE Corporation & Southern Pacific Co.

FCC 83–269

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of Application of GTE Corporation and Southern Pacific Company for Consent to Transfer Control of Southern Pacific Communications Company and Southern Pacific Satellite Company	File No. ENF-83–1

MEMORANDUM OPINION AND ORDER

(Adopted: June 2, 1983; Released July 1, 1983)

BY THE COMMISSION: COMMISSIONERS FOGARTY AND SHARP NOT PARTICIPATING.

1. Before the Commission is an application filed by GTE Corporation (GTE) and Southern Pacific Company (SP) pursuant to Sections 212, 214 and 310(d) of the Communications Act[1] as well as Parts 21, 25, 62 and 90 of the Commission's Rules[2] seeking consent to

[1] SP or its subsidiaries hold authorizations from this Commission to provide common carrier communications service regulated under Title II of the Communications Act as well as radio licenses granted pursuant to Title III of the Act. Section 310(d) provides generally that no radio construction permit or license shall be transferred without an application to the Commission and our finding that the public interest, convenience and necessity will be served. Section 212 makes it unlawful for any person to hold the position of officer or director of more than one carrier subject to the Act without Commission authorization. Finally, Section 214 provides in pertinent part that no carrier shall acquire or operate any line or engage in the transmission over such line unless it first obtains from the Commission a certificate that the present or future public convenience and necessity requires such construction or operation.

[2] 47 CFR Parts 21, 25, 62, and 90 concern, respectively, implementation of domestic public fixed radio service; satellite communications; interlocking directorates; and private land mobile radio services. Additionally, we note in passing that the Common Carrier Bureau, *inter alia*, requested the applicants to submit information pursuant to Section 63.71 of the Commision's Rules, which requires that a carrier planning to discontinue, reduce, or impair service notify all customers of the change. Applicants argue in response that such a notice procedure is unwarranted because SPCC customers would in any event continue to take service

transfer control of domestic and satellite radio licenses as well as the service authorizations of Southern Pacific Communications Company (SPCC) and Southern Pacific Satellite Company (SPSC) from SP to GTE.[3] The application provides that GTE will acquire all of the stock of SPCC and SPSC for approximately $737 million, and also assume at least $100 million of those companies' debts. GTE contends that through the infusion of capital into SPCC and SPSC, GTE can make both companies strong competitors in the nationwide interexchange voice telecommunications market. For the reasons discussed below, we conclude that transfer of the subject authorizations and licenses as conditioned will serve the public interest, convenience, and necessity, and, accordingly, we grant the application.

BACKGROUND AND CONTENTIONS

2. The acquiring entity, GTE Corporation is a holding company. Through subsidiaries, it engages in communications operations, the manufacturing of communication products, and the planning of network systems and operations. In 1982, GTE and its subsidiaries employed nearly 200,000 people and had total revenues and sales of over $11 billion. One subsidiary, GTE Service Corporation, offers consulting and advisory service to the other GTE companies. Still other subsidiaries provide services relating to financial, insurance and data processing activities.

3. GTE's business operations are divided into four groups. The Communications (Telephone Operating) Group is the largest and accounts for over 65% of total revenue and sales. Taken as a whole, GTE's landline telephone companies comprise the largest independent telephone system in the United States, serving approximately 16,085,000 telephones in 7,500 communities in portions of 31 states. Among these, the GTE Companies of California, Florida and the Southwest account for the largest portion of total telephone revenues. In addition, through its ownership of Anglo-Canadian Telephone Company, GTE, is involved in the furnishing of telephone service in Canada and the Dominican Republic. Also part of the communications group is GTE Satellite Corp. (GSAT) which in

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under existing tariffs. Alternatively, the applicants request a waiver of the rule, in part on the theory that notification to 500,000 customers would be a hardship. While there may be a technical discontinuance of service when one carrier transfers responsibilities for its operations to another, here it would be burdensome to notify 500,000 customers and it does not appear that customers will actually experience any discontinuance or impairment of service. Therefore, we find that a waiver of Section 63.71 is justified.

[3] Also before us are petitions to deny or comments filed by MCI Telecommunications, Inc. (MCI), the State of Hawaii (Hawaii), American Satellite (Amsat), Satellite Business Systems (SBS), and U.S. Telephone (U.S. Tel.). The applicants have opposed or answered these petitions, and all parties filed replies to the opposition. See Appendix A for a list of the pleadings filed.

addition to owning three earth stations for joint operations of a domestic satellite network with the American Telephone and Telegraph Company (AT&T), is authorized by this Commission to construct three satellites of its own and operate two of them in orbit.

4. The GTE Communications Products Group produces a wide range of communications systems equipment and service. This group sells various types of equipment to GTE telephone operating subsidiaries as well as to non-affiliated telephone companies, government agencies, industrial companies, railroads and electric utilities. Sales for 1982 were $2.5 billion.

5. The GTE Electrical Products Group manufactures lighting and electrical products for residential, commercial, industrial and photographic use. It also, through its Precision Materials unit, manufactures and markets custom parts, components and materials. Electrical Product sales totaled $1.6 billion for 1982.

6. The fourth and final operation, GTE Telecommunications Group, through GTE Telenet, develops and markets advanced data communications systems. GTE Telenet's "packet-switched" network is used by approximately 600 businesses and government organizations providing communications between a variety of computer and data terminals. In 1981, this group had sales of $105 million.

7. The transferor, Southern Pacific Company, is also a holding company. In addition to communications, it is engaged, through subsidiaries, in rail, truck, petroleum pipeline, and coal slurry pipeline transportation, land and natural resource development, and financial services.

8. SPCC, a wholly-owned subsidiary of Southern Pacific Company, is a domestic communications common carrier which provides transmission primarily in the form of switched intercity voice and data telecommunications. SPCC owns and operates a microwave network of over 46 million circuit miles extending into about 260 metropolitan areas in 45 states and the District of Columbia. In 1981, SPCC added over seven million circuit miles to its network with the completion of a new southwestern microwave route connecting Washington, D.C., Chicago, Atlanta, New Orleans and Houston. Service was also extended into Florida and the Pacific Northwest via leased facilities.

9. The company's principal business, Sprint, is a long-distance communications service accessed through regular local exchange telephone lines. As of the end of 1982, Sprint had more than 2,300 employees, and served 535,000 business and residential customers. SPCC has supplemented Sprint with a new service, Sprint Universal Service, which will allow customers to place calls to any telephone in the continental U.S. The remainder of SPCC's business is derived from the leasing of private circuits to about 1,100 corporate and government users, and from market and support services such as leasing of facsimile equipment. In 1982, SPCC had operating

revenues of $393.4 million, an increase of $161.9 million over 1981. Income from its operations was $104.0 million. The total assets of this company in 1982 were $477.1 million.

10. SPSC, a wholly-owned subsidiary of SP, is authorized by this Commission to provide domestic satellite communications service but is not yet operating. As matters now stand, under a contract awarded by SP in 1981, RCA Corporation is to build three satellites for SPSC at a cost of about $123 million. Under this arrangement, two of the satellites are scheduled for launch in 1984 with the third satellite being held as a ground spare. Approximately 20 percent of the satellites' capacity will be used for SPCC telecommunications requirements, to increase circuit capacity on heavily used routes, and to extend service into areas of the country not covered by SPCC's existing microwave network. The remaining capacity will be made available on both common carrier and non-common carrier bases to television program suppliers and other major users of communications. SPSC has already received Commission authorization to sell 10 transponders on Spacenet II, the second of its satellites. *In the Matter of SPSC*, FCC 82–512, released November 29, 1982.

11. Under the terms of the proposed transfer, the parties agree that GTE will acquire all of the stock of SPCC and SPSC. The prices for each is to be calculated in accordance with the terms of the Stock Purchase Agreement, dated October 15, 1982. See Exhibit I to the Application. The price to be paid for the SPCC stock is $700 million in cash, less a refinancing adjustment of approximately $22 million to be precisely fixed by an investment banking firm mutually agreeable to the applicants. The applicants further state that the price to be paid, in cash, for the SPSC stock is an amount equal to its stated value on the books of SPSC together with additional paid-in capital. The applicants estimate this price to be approximately $59 million. As a result, the estimated net price for the transfer would be $737 million.

12. The desire by SP to sell SPCC/SPSC appears to have been precipitated by the holding company's assessment of its overall capital requirements for the next several years. SP reasons that the imminent break up of the Bell System will result in intensified competition in interexchange telecommunications, and therefore require that SP infuse substantial additional capital into SPCC's microwave network if that carrier is to compete effectively. At the same time, SP estimates that it will require larger capital investment for other endeavors, particularly railroading. Apparently unable or unwilling to do both, SP has made a corporate decision to concentrate its efforts on railroading. GTE, in turn, states that it is in a position to provide the necessary capital for infusion into SPCC/SPSC to ensure its continuity as a vigorous and viable interexchange competitor. On this principal ground, the applicants

assert that the transfer is in the public interest and consistent with this Commission's pro-competitive policies.

13. The petitions to deny and comments challenge these assumptions on a number of grounds. Initially, MCI and SBS dispute GTE's financial ability and qualification to acquire and infuse necessary capital into SPCC/SPSC while at the same time adequately maintaining GTE's local service. Furthermore, even assuming financial viability, several petitioners foresee numerous anticompetitive effects resulting from GTE's acquisition of an interexchange carrier. Thus, on one level, they perceive a potential for GTE to favor SPCC over other interexchange carriers requiring access to GTE's local exchange facilities. They claim such favoritism could be in the form of discriminatory rates; unequal technical interconnection; or cross-subsidization by GTE's monopoly and competitive services. And, on another level, they fear that the addition of an interstate microwave network to GTE's existing telephone, manufacturing, and planning operations will discourage competition by creating a vertically integrated company which emulates the Bell System structurally prior to divestiture. Other petitioners take the view that the transfer would unduly concentrate GTE's market power in the satellite field. Finally, because GTE's subsidiary, the Hawaiian Telephone Company, is already the monopoly provider of local exchange service in the state as well as a provider of interexchange toll and private line services to the Mainland, the state of Hawaii asks that we impose conditions to ensure that the benefits of competition are not denied to its citizens. Before disposing of these issues, however, we need address several preliminary procedural matters.

14. MCI, SBS, and Hawaii argue that a full evidentiary hearing is warranted before the Commission may approve this transfer. Relying on the decision in *U.S. v. F.C.C. (SBS)*, 652 F.2d 72 (D.C. Cir. 1980), they contend that the requirements for a trial type hearing under Section 309(e) of the Act have been met because the petitions have raised genuine factual questions and further, because the Commission lacks sufficient information on which to make an informed judgment.[4] See 652 F.2d at 88–89.

15. As petitioners correctly imply, the determination of whether to have a full evidentiary hearing is by no means a mechanical process; rather, it is initially a matter of agency discretion in which we are required to evaluate the need for such a hearing under our public interest responsibility. *SBS*, *supra*, 652 F.2d at 90, n. 87. As that decision also prescribes, the Commission must exercise that judgment with great care, since further evidentiary inquiry may be a

[4] Section 309(e) specifies that if "a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding (of public convenience and necessity). . ., it shall formally designate the application for a hearing. . .." The required hearing is described as a "full hearing in which the applicant and other parties in interest shall be permitted to participate."

"potent instrument for delay". *Id.* at 91. Indeed, the question of delay seems particularly pertinent here, since the stock purchase agreement provides that either GTE or SP may withdraw if this Commission does not act by July 1, 1983.[5] Moreover, in the interests of employee and customer certainty, the applicants have asked for expedited action. At the same time, it appears that action by the U.S. District Court for the District of Columbia on the proposed final judgment recently agreed to by GTE and the Department of Justice (DOJ)[6] awaits our resolution of this transfer to the extent that the comment period under the Tunney Act[7] will not end until 20 days after this Commission disposes of the application. In other words, if this Commission were to find reason to deny the application under the Communications Act, the antitrust proceeding would become moot.

16. The question, then, is whether the record now before us is sufficient to resolve the two essential legal issues before us, namely, whether GTE is financially qualified to acquire and capitalize SPCC/SPSC without harming local telephone service and, if so, whether the acquisition would substantially lessen competition to the detriment of the public interest.

17. We judge the record before us more than ample for these purposes. Already before us are extensive public comments on both the application and the additional detailed financial information requested by the Common Carrier Bureau. See para. 30, below. Moreover, with regard to the antitrust allegations, we have been able to draw upon a number of sources, including, but not limited to, our own studies of the marketplace in recent Commission proceedings (*e.g.* the *Competitive Carrier Rulemaking Proceeding*, Docket No. 79–252[8] and the *MTS/WATS Market Structure Proceeding*, Docket No. 78–72); submissions by the parties after examining the Hart-

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[5] *See* Appendix A to Application, Art. XIII, para. 13.02.

[6] Civil Action No. 83–1298. The primary conditions of the proposed final judgment bearing on the issues in this case may be summarized as follows:

1. GTE shall maintain complete corporate and operational separation between the GTE operating companies and SPCC and SPSC. It further provides that GTE/SPCC/SPSC shall not maintain common directors other than the Chief Executive Officer and President of GTE Corporation.

2. GTE telephone operating companies will provide equal local exchange and information access to interexchange carriers and information services providers on a phased-in schedule.

3. The GTE telephone operating companies may provide not only basic exchange telephone services and customer premises equipment but also, through a separate operating division or subsidiary, more sophisticated, enhanced information services.

[7] Antitrust Procedures and Penalities Act, 15 U.S.C. §§ 16(b)-(h).

[8] 85 FCC 2d 1 (1980).

Scott-Rodino materials released by the Federal Trade Commission (FTC) and DOJ[9]; the competitive impact statement and the proposed final judgment negoitated by GTE and DOJ[10]; and, finally, the fruits of the independent negotiations between the state of Hawaii and GTE to resolve the special problems in the islands.[11] As will become apparent below, these submissions and data as a whole form a sound bedrock upon which this Commission can make reasonable and fully supportable findings under applicable principles of law. Moreover, petitioners have not demonstrated that there are any material facts which require further development through an oral evidentiary hearing.

18. The Hart-Scott-Rodino materials just mentioned have also posed other procedural issues which remain to be resolved. At the time of the filing, GTE and SP jointly requested that certain of the documents attached to their application (hereafter "Category I" documents) as well as those documents entitled "Hart-Scott-Rodino materials" (hereafter "Category II") which were submitted to the FTC and DOJ pursuant to 15 U.S.C. § 18a(h) be granted confidential treatment and exempted from public disclosure pursuant to Section 0.457 of our rules. The Common Carrier Bureau ruled that the Category I documents were confidential under 47 CFR § 0.459 of the Rules and thus exempt from disclosure pursuant to 47 CFR § 0.457(d) and Section 554(b)(4) of the Freedom of Information Act. This action was affirmed by the Commission. *GTE Corporation*, FCC 83–72, released February 18, 1983. In doing so, however, the Commission agreed to make the Category I confidential information available for inspection subject to a protective order.

19. With regard to the Category II materials, however, the Commission perceived immense practical and procedural problems in dealing with such a vast number of documents (approximately 160,000 pages.) It therefore ordered that those materials be returned to the applicants, and urged them to reach an agreement with other parties on availability. Subsequently, GTE/SP entered such a protective agreement with MCI, under which the latter was permitted to inspect, *inter alia*, the Category II documents.[12] MCI thereaf-

[9] The Hart-Scott-Rodino Antitrust Act is an amendment to the Clayton Act providing for pre-merger notification and review by the FTC and DOJ. It enables those agencies to enforce the Clayton Act by means of injunctions before a merger has occurred rather than waiting to institute antitrust proceedings against a newly merged entity. The Act further states that any information or documentary material filed with the DOJ or the FTC pursuant to this section shall be exempt from disclosure except where such material "may be relevant to any administrative or judicial action or proceeding."

[10] *See* footnote 6.

[11] *See* para. 62, *infra*.

[12] We have no knowledge whether the other parties either sought or received access to the Category II documents by means of an agreement.

ter filed additional comments "under seal," that is, on a confidential basis, which purported to analyze further these Category II documents within the scope of the issues originally raised in its petition to deny. As part of this confidential filing, MCI supplied an appendix of the portions of these Category II documents upon which it relied.[13] The applicants have filed a confidential responsive pleading to the contentions in MCI's supplemental analysis, and MCI has replied.

20. In light of the above, we believe a question is raised as to whether the relevant information for which the applicants originally requested confidential treatment should be included in the public record in this proceeding. As noted, the applicants ask that we return them if confidentiality cannot be granted.

21. Under Section 0.459(e) of our Rules, where materials are submitted voluntarily with a request that they be returned without consideration if confidentiality cannot be granted, the Commission may nonetheless make these materials available for public inspection if it finds the public interest so requires. Even assuming *arguendo* that some of these documents might otherwise qualify as confidential commercial and financial information under 5 USC § 553(b)(4), we think the public interest nonetheless lies with making available for public inspection these relatively few documents which have been relied on by MCI or GTE in addressing the issues in this case. GTE may be correct that if these documents are made public, it will be competitively disadvantaged. However, after reviewing the documents carefully we do not think the disadvantage to be so great as to outweigh the benefits of making them public.[14] As explained, this transfer raises important questions of GTE's financial ability to continue to provide adequate local service after acquiring SPCC/SPSC as well as the effects of the acquisition on the burgeoning competitive interexchange marketplace. In these circumstances, we believe the public and the purposes of the Act are better served by making available all materials which have been considered in disposing of those issues.

22. This leaves an outstanding motion by MCI requesting that the Commission, under Section 4 of its protective order released February 18, 1983 (see para. 18 above), permit MCI to submit the Category I and Category II documents in a California Public Utilities Commission (CPUC) proceeding. It would also have us ask for the discovery materials produced in the California proceeding. In their reply, the applicants offer to make available to this Commission upon request all the California documents covered by the protective

[13] MCI's appendix also contained portions of transcripts in a California proceeding which involves, *inter alia*, the impact of this transfer on GTE service in that state. MCI has filed a motion requesting us to consider this material. We discuss this motion in paras. 22–23, below.

[14] *See* note 9 above.

agreement between GTE/SP and MCI, but object to allowing both the Category I and the Category II documents to be submitted in the California proceeding.

23. Initially, as to inspection of the Category I documents, we find no basis to modify our protective order because the CPUC has made no formal request for modification of our protective order to accord similar treatment for Category II materials does not lie because they are outside the scope of that order. To repeat, our February 18 protective order covers Category I materials but not Category II. Moreover, these latter materials are not in any case within the Commission's control, having been returned to GTE/SP in their entirety. In these circumstances, MCI's proper remedy is to negotiate with the applicants an amendment to their own protective order agreement as to the Category II documents.

24. Furthermore, we see no basis to take applicants up on their offer to make the documents produced in discovery in the California proceeding available to the Commission. As just explained (para. 17), we believe the record already before us is more than ample for disposing of the issues in this case.

DISCUSSION

25. As noted, the proposed transfer of certificates of common carriage and radio licenses calls into play essentially similar responsibilities imposed on us by Sections 214 and 310(d) of the Act to insure that the public interest, convenience, and necessity will not be adversely affected.[15] Subsumed in this is the requirement that we review, as may be appropriate, the citizenship, character, and technical and other qualifications of the transfer applicant. See 47 U.S.C. §§ 310(d) and 308(b). In this case, only the ability of GTE to finance the acquisition and infuse additional capital into SPCC/SPSC is challenged and it appears that GTE, a long term Commission licensee and communications carrier, satisfies the other threshold qualifications.[16] Moreover, even if we find GTE qualified, we must then also ascertain, as part of our Title II and Title III analysis, whether the transfer holds promise for benefiting the public interest, for example by rate and service improvements stimulated by competition. Accordingly, we address first the issue of

[15] Section 214(a) provides in pertinent part that no carrier shall "acquire or operate any line" unless and until obtaining from this Commission a certificate that the "present or future public convenience and necessity requires or will require the . . . operation of such additional or extended line . . ." Section 310(d) permits a transfer of a radio license upon a finding that the "public interest, convenience, and necessity will be served thereby."

[16] No contention is raised that GTE lacks the expertise to provide service consistent with the public convenience and necessity. Given the company's broad experience in interexchange and satellite communications, we have no reason to believe otherwise.

whether the transferee (GTE) has the financial resources to acquire and finance SPCC and SPSC without adversely impacting its ability to reasonably maintain and, if necessary, expand its present local telephone network.[17]

26. *Financial Qualification.* As mentioned, GTE asserts that the acquisition will result in a significant increase in competition in interexchange telecommunications and a marked expansion of the range of services available to the public. The underlying assumption is that GTE possesses both the financial capability and the motivation to infuse the necessary capital into SPCC/SPSC to make these companies viable competitors of AT&T.

27. At the outset, MCI strenuously questioned GTE's professed financial capability and motivation to finance SPCC and SPSC. In support, MCI submitted with its reply to applicants' opposition a financial analysis which suggested that it was unlikely that GTE could both acquire and foster the growth of SPCC and SPSC without having an adverse impact on its local telephone operations and ratepayers. MCI began by calculating that GTE's total capital requirements in 1983, including the cost of the acquisition, would be approximately $4.05 billion. According to MCI, $2.7 billion of GTE's total 1983 capital requirements would be invested in GTE's current telephone operations, with the remaining $1.35 billion committed to financing the acquisition and capitalization of SPCC and SPSC. In evaluating GTE's ability to generate funds internally, the analysis stated that for the period 1979–1981, GTE's internal capital generation averaged approximately 66%, well below the industry average of 95%. MCI further pointed out that for 1981, SPCC's internally generated funds represented only 40% of its total capital requirements. Based on this performance in generating capital in 1979–1981, MCI estimated that GTE and SPCC could only generate $2.13 billion of the required $4.05 billion internally, and would be forced to raise the $1.92 billion shortfall externally.

28. The analysis then turned to GTE's ability to raise capital externally either through debt or equity. In this regard it emphasized that for the previous five operating years (1977–1981) GTE had raised an annual average of only $760 million externally. Accepting this as roughly the limit of GTE's ability to attract outside capital, MCI contended that it was unlikely that GTE would easily succeed in

[17] We recognize that the Act does not confer upon this Commission traditional regulatory authority over the provision of intrastate communications service. Rather our responsibilities here flow from the Congressional mandate expressed in Section 1 of the Act to make available, so far as possible to all the people of the United States, "a rapid, efficient nationwide and world-wide wire and radio communications service with adequate facilities at reasonable charges . . ." 47 U.S.C. § 151. Self evidently, were we to permit an acquisition which on its face seemed likely to harm the viability of local service, an adverse impact on interstate and foreign communications would surely not be far behind. *Cf.* MTS and WATS Market Structure, FCC 83–579, released February 28, 1983.

generating the necessary $1.92 billion externally. Alternatively, even assuming that GTE could raise the required $1.92 billion externally, MCI estimated that GTE's present long-term debt ratio of 59% would increase to over 60%, a figure significantly higher than AT&T's 45% or the 52% average for the five next largest independent telephone companies.

29. Given these circumstances, MCI concluded that it was unlikely that GTE could raise sufficient funds to acquire SPSC and SPCC for $750 million, infuse capital into the two companies, and still maintain its current operations. In order to acquire and foster the growth of SPCC and SPSC, MCI contended that GTE would have to divert monies from its local telephone operations and/or raise additional funds externally. MCI perceived that either scenario was likely to be detrimental to GTE's local subscribers. Thus, if needed capital for local telephone operations were diverted to finance the acquisition, MCI stated that the quality of local service would invariably suffer. Alternatively, if GTE were forced to borrow more heavily at higher interests rates to make up the shortfall between its internal fundraising capability and the capital required to acquire and finance SPCC and SPSC, the local ratepayer might have to bear indirectly the cost of the acquisition in the form of higher rates. In short, MCI asserted that without further information, the Commission could not make a reasoned analysis of GTE's financial qualifications to acquire and capitalize SPCC and SPSC.

30. In apparent agreement that neither the application nor GTE/SP's opposition provided sufficient data necessary to make a determination of GTE's financial capability to acquire and capitalize SPCC and SPSC, the Common carrier Bureau solicited further information from the applicants in order to complete its analysis of the application and address the concerns raised by MCI.[18] GTE responded to the Bureau's request on March 17, 1983 and MCI submitted comments on March 24, 1983. The Bureau then followed

[18] *See*, letter of Chief, Common Carrier Bureau to GTE dated March 11, 1983. There the Bureau requested that GTE provide the following information:

(1) The full purchase price of the acquisition and the source of funds to finance the purchase.

(2) The amount and source of capital GTE plans to infuse into SPCC and SPSC in 1983–87.

(3) A description of the financial and operational impact the acquisition will have on GTE and its telephone operating subsidiaries.

(4) A description of the corporate and operational relationships between GTE and SPCC/SPSC and between GTE's present subsidiaries and SPCC/SPSC.

with a second information request seeking clarification of GTE's initial response.[19]

31. The latest information submitted by GTE discloses that absent the acquisition, GTE's projected consolidated capital requirements over the 1983–1987 period are $19.9 billion.[20] Of this amount, 91% would be generated internally, while the remaining amount ($1.9 billion) would be obtained externally, with primary reliance on equity. When adjusted to include its investment in SPCC and SPSC, GTE's consolidated capital requirements over the 1983–1987 period would increase from 19.9 billion to $23.1 billion.[21] In other words, GTE estimates that $3.2 billion would be required to finance the acquisitions and support the growth of SPCC and SPSC over the 1983–1987 period. GTE projects raising 86% of this amount internally, and the remaining 14% externally through both debt and equity financing.

32. MCI, in its supplemental pleadings, essentially takes issue with the reliability of GTE's estimates submitted in response to the Bureau's request. Specifically, it questions the consistency of these figures with some of GTE's earlier projections. For example, MCI notes that GTE's 1983–87 strategic plan projected that, assuming the acquisition, $4.3 billion in external financing would be required. It contrasts this with the most recent figure of $3.15 billion submitted by GTE in its April 1 response. These changes in GTE's financial projections, however, strike us as reasonable. For one thing, we may take notice that the rate of inflation and the level of interest rates have decreased in recent months.[22] Moreover, GTE's latest projections address for the first time other factors not mentioned in earlier projections. For example, one such factor is the new Accelerated Cost Recovery System[23] which substantially reduces the depreciable life for tax purposes of major categories of capital equipment and has a

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[19] *See*, letter dated March 31, 1983 from Chief, Common Carrier Bureau to Vincent Gallogly, GTE. GTE responded to the second request by letter dated April 8, 1983, and MCI filed comments on April 13, 1983.

[20] Appendix B, Table I.

[21] Appendix B, Tables I and IV.

[22] As some evidence that there are decreased capital requirements at the local level, we may take notice that GTE has recently reduced its pending rate increase request in California from $475 million to $369 million. See General Telephone of California Notice of Intent to File Application for General Rate Increase, tendered August 31, 1982, resubmitted March 31, 1983, before the Public Utilities Commission of the State of California.

[23] Economic Recovery Tax Act of 1981, § 201, 26 USC § 168 (1981). Acting out of concern that the existing rules for determining depreciation allowances did not provide adequate investment stimulus essential for economic expansion, the 97th Congress replaced that system of depreciation with the Accelerated Cost Recovery System (ACRS). Enacted as Section 201 of the Economic Recovery Tax Act of 1981, ACRS permits recovery of capital costs for most tangible depreciable property using accelerated methods of cost recovery over predetermined recovery periods. Under ACRS the entire cost or other basis of eligible property is

positive impact on the internal generation of funds. GTE letter of April 8, 1983, *supra*. Also, the Commission has recently authorized accounting rule changes which are likely to enhance GTE's cash flow.[24] Under these circumstances, we see no basis not to consider GTE's latest figures for purposes of our financial qualifications analysis.

33. GTE has provided the Commission with the following information: detailed estimates of the cost of the proposed acquisition; evidence of its ability to finance the acquisition; and five-year projections of the financial impact that the acquisition will have on its existing operations. In reviewing this latest submission, our intention is to determine whether GTE has the financial resources necessary to acquire SPCC and SPSC, and whether its resources are also sufficient to avoid any future adverse impact on its local telephone operations. Thus, on one level, we must look to the five year projections to ascertain whether there is reason to believe that the local companies would suffer over time as result of the acquisition. And, as a separate matter, we must ascertain whether GTE will have sufficient resources immediately to purchase SPCC/SPSC at the stated price while meeting other financial commitments.

34. GTE estimates its capital funding obligations for 1983 through 1987, including the cost of acquiring and financing SPCC and SPSC, to be $23.1 billion. Of this amount, GTE asserts that it will be capable of generating approximately $20.0 billion internally. While GTE's historic performance in generating capital externally does not reflect this alleged capability, we are nonetheless confident that GTE can generate this amount in the future. As mentioned, the new Accelerated Cost Recovery System and the Commission's accounting system revisions can be expected to contribute significantly to GTE's ability to generate funds internally.[25] In addition, the profitability of GTE's existing operations has increased over the

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recovered, eliminating the salvage value limitation under previous law. ACRS is expected to stimulate capital formation and increase productivity. See, S. Rep. No. 144, 97th Cong, 1st. Sess. (1981).

[24] See, Amendment of Part 31 (Uniform System of Accounts for Class A and Class B Telephone Companies), 83 FCC 2d 267 (1980) ("Property Depreciation") and, Amendment of Part 31, Uniform System of Accounts for Class A and Class B Telephone Companies, 85 FCC 2d 818 (1981) ("Uniform System of Accounts"). In Property Depreciation the Commission amended its accounting regulations to permit depreciable property to be placed in groups comprised of units with expected equal life for depreciation under the straight line method so as to "calibrate more closely the flow of revenues with the recovery of capital." 83 FCC 2d at 281. In Uniform System of Accounts, the Commission amended its accounting regulations to provide for expensing rather than capitalization of the inside wiring portion of station connection costs. Also amended were rules related to accounting for sale of carrier provided terminal equipment. See also note 25 below.

[25] GTE estimates that over the 1982–1987 period, ACRS will increase its internal generation of funds by approximately $1.6 billion while the Commission's

years and we have no reason to doubt that this trend will not continue.[26] Furthermore, the cash-flow from SPCC/SPSC is expected to contribute positively to GTE's consolidated cash flow by 1987. GTE letter of April 8, 1983, *supra*, at p. 7. Given SPCC's past pattern of growth we have no reason to question this expectation either.[27]

35. GTE plans to raise externally the remaining $3.15 billion of its total projected capital requirements for 1983–1987. Of this amount approximately $1.479 billion is obligated in 1983, due primarily to the one-time acquisition cost.[28] GTE will raise the necessary $3.15 billion from employee and shareholder investment plans, through public sales of debt and equity and through borrowing from commercial banks. In regard to the latter, GTE has secured the commitment of a consortium of twenty banks to provide the required credit lines to finance the stock purchase.[29] Moreover, given its enhanced capability to generate funds internally, GTE projects that the amount of external resources required for all GTE operations will decrease to zero by 1987. Consequently, GTE projects that this will lead to a long term decrease in its debt/equity ratio from 56.3% in 1982 to 49.6% in 1987.

36. In short, GTE contends that the projected capital requirements of SPCC/SPSC for the 1983–1987 period will have no adverse impact on its telephone operating companies.[30] This assertion seems reasonable. The projected annual growth rate for GTE telco plant additions for the 1983–1987 time period averages 11% compounded. This would seem to be an ample growth rate by industry standards[31] and, in addition, would imply that GTE does not plan to constrain the growth rate of its telephone companies in order to finance the acquisition. Moreover, under the terms of the conditions we impose as well as the proposed final judgment negotiated by GTE and DOJ, GTE is obligated to operate SPCC separately from its local exchange operations, thereby helping to assure that funds infused into SPCC will not be at the expense of the local telephone companies. This

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accounting rule changes are expected to enhance this amount by an additional $1.7 billion.

[26] In the period 1977–1982, GTE's income from continuing operations, applicable to common stock, increased at a annual rate of 9.4%. Source: *GTE Corporation Annual Report*, 1982.

[27] In 1982 SPCC's income from continuing operations totaled $104.0 million, a $65.1 million increase from its 1981 total of $38.9 million. Source: *Southern Pacific Company Annual Report*, 1982.

[28] *See* Appendix B, Table I.

[29] *See*, letter dated April 29, 1983 from Vincent Gallogly, GTE to Chief, Enforcement Division, Common Carrier Bureau. There, GTE has provided the Bureau with the names of the banks which have agreed to furnish to GTE credit lines, aggregating $775 million, for purposes of the acquisition.

[30] *See* Appendix B, Tables II and IV.

[31] Annual growth rate in book cost of telephone plant for all carriers filing with the Commission was 9.5% for the 5-year period 1977–1981. (Source: *Statistics of Common Carriers* year end 12/31/81; FCC). We also observe in passing that GTE's telco growth for 1977–1982 was 10.8% (1982 GTE Annual Report).

latter safeguard should make it easier for regulatory bodies and customers alike to monitor the situation.

37. *Competitive Impact.* Having determined that GTE is qualified to acquire and foster the growth of SPCC and SPSC, we may now examine the alleged anticompetitive aspects of the proposed transfer.

38. Section 7 of the Clayton Act proscribes the acquisition of the stock, other share capital, or assets of a company by another company "where in any line of commerce in any section of the country," the effect of such acquisition may be "substantially to lessen competition, or to tend to create a monopoly."[32] Under Section 11 of the Act, moreover, this Commission is obliged to enforce Section 7 in the case of "common carriers engaged in wire or radio communications or radio transmissions of energy."[33] The courts have construed this to mean that "the requirements of Section 11 of the Clayton Act and the applicable provisions of the Communications Act are satisfied when the Commission seriously considers the antitrust consequences of a proposal and weighs those consequences with other public interest factors."[34] In other words we are required to consider anticompetitive consequences as one part of our public interest calculus.[35]

39. The applicable judicial precedents direct that the Section 7 analysis begin with a determination of the relevant market in which competition may be threatened.[36] In turn, to ascertain the market affected for purposes of Section 7, we must delineate both the relevant "product" market (i.e. the "line of commerce") as well as the relevant "geographic" market (i.e. "section of the country").[37] To assist us in this endeavor, we have employed the most recent Department of Justice *Merger Guidelines (Guidelines).*[38] In particular, we have found them useful in defining the relevant product and geographic markets; ascertaining the type of merger involved (i.e. horizontal or non-horizontal); and, finally, evaluating the impact of the proposed merger on competition in those markets.

40. As explained above, our initial task is ascertainment of the

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[32] 15 U.S.C. § 18.

[33] 15 U.S.C. § 21.

[34] U.S. v. FCC (SBS), *supra*, 652 F.2d at 88.

[35] Id. at 87, citing Denver and Rio Grande Western Railroad v. U.S., 387 U.S. 485 (1967).

[36] U.S. v. E. I. DuPont de Nemours and Co., 353 U.S. 586 (1957); United States v. Continental Can Co., 378 U.S. 441 (1964); Standard Oil Co. v. United States, 337 U.S. 293, 299–300 n. 5 (1949); U.S. Department of Justice, *Merger Guidelines-1982*, 2 Trade Reg. Rpts. (CCH) para. 4500, at para. 4502 (Guidelines).

[37] Brown Shoe Co. v. U.S., 370 U.S. 294 (1962).

[38] While the standards set forth in the *Guidelines* do not have the force of law and are not binding on either DOJ or the judiciary, a number of courts have nevertheless accepted them as a useful tool in analyzing mergers. U.S. v. Hammermill Paper Co., 429 F. Supp. 1271, 1280 (1977).

relevant "product" market. For the narrow purposes of this proceeding, we define the relevant market of products competing with the interexchange services of GTE/SP as all interexchange telecommunications services, as most parties have argued.[39]

41. There is some controversy among the parties, however, as to the relevant geographic market. GTE would define this market as nationwide, while MCI would confine it to only those parts of the U.S. from which users of GTE facilities can make long distance calls.

42. We find MCI's assessment unduly narrow. The geographic aspect of the market is traditionally defined as the area in which sellers of the particular product operate. *United States v. Phillipsburg National Bank and Trust Co.*, 399 U.S. 350 (1970). Moreover, the geographic aspect of the relevant market must reflect considerations of supply and demand substitutability. *See Guidelines*. In this case, supply substitutability shows that the relevant geographic market of interexchange telecommunications suppliers is nationwide. Several interexchange suppliers have nationwide networks with the capability to provide alternate geographic routings. For example, SPCC's network extends into about 260 metropolitan areas in 45 states and the District of Columbia. At present, approximately 76 million telephone main stations and equivalent main stations or 91% of the total national main stations and equivalent main stations have the capability to originate Sprint services.[40] Also, satellite and microwave interexchange suppliers have the ability rapidly to enter new geographic areas or to supplement their capacity in areas they already serve by diverting capacity from other areas or employing unused capacity. As for demand substitutability, many customers consider an interexchange carrier's ability to serve multiple points and its prices for service to those geographic points when choosing a supplier. Consequently, we do not agree that the geographic market can properly be limited to only particular areas of the country served by GTE; to the contrary, as we see it, the relevant geographic area of competition facing the proposed GTE/SPCC entity would be national in scope.[41]

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[39] In opposing GTE's acquisition of SPSC, U.S. Tel. would apparently carve out domestic satellite service as a submarket. We have previously found, however, that satellite and terrestrial communications systems are reasonably interchangeable, and thus that satellite communications do not constitute a distinct submarket. See, Satellite Business Systems, Inc., 62 FCC 2d 997 (1977), *recon. denied*, 64 FCC 2d 872 (1977), *affirmed sub nom.* U.S. v. FCC, 652 F.2d 72 (1980).

[40] *See* letter of SPCC to Chief, Enforcement Division, Common Carrier Bureau dated May 6, 1983.

[41] For its part, Hawaii contends that although the relevant geographic market is national in scope, the state of Hawaii is nonetheless a readily definable and separate telecommunications market and as such constitutes a relevant geographic market for the purpose of reviewing this acquisition. Hawaii argues that for commercial and regulatory purposes it is generally treated as separate and distinct from the Mainland, and stresses that telecommunications services are provided to Hawaii on a rate schedule different from that applicable in the

43. Having determined the relevant product and geographic markets, we may now ascertain the type of merger involved here. In this connection, the *Guidelines* provide for two separate and distinct categories of mergers, namely, horizontal, i.e. between firms in the same market, and non-horizontal, that is, between firms that do not operate in the same market. There are both horizontal and non-horizontal elements here, but, as we discuss below, neither would appear to threaten competition.

44. In addition to local exchange access for interexchange traffic, subsidiaries of GTE provide some interstate services: Hawaiian Telephone Co. provides interexchange message toll, private line, and ancillary services between Hawaii and the Mainland; GSAT participates in the provision of interstate communications;[42] and Telenet provides packet-switched data service. Since SPCC also provides interexchange telecommunications services, the acquisition may be said to have some horizontal characteristics. Nonetheless, available data show that the respective market shares of GTE and SPCC in the relevant market are very small, and will be so even after launches of their authorized satellites. In addition, there have been many recent successful entrants in that market. In these circumstances, we find that this acquisition will not increase substantially concentration in the relevant market or, given the presence of AT&T, allow GTE/SPCC to obtain market power.[43]

45. GTE also can be viewed as primarily a local exchange carrier

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Mainland. By eliminating SPCC as an independent carrier, Hawaii asserts, GTE will further solidify its monopoly position in Hawaii and use that power to foreclose the market to future potential competitors. We see no need, however, to ascertain whether Hawaii is a distinct geographic submarket for purposes of our Clayton Act analysis. Reduced to essentials, Hawaii's real concern in this proceeding is that approval of that acquisition would restrict the state's access to the benefit of increased competition in the telecommunications marketplace. We agree that to the extent GTE, through its subsidiary Hawaiian Telephone Company, is in the unique position to provide both local exchange and interexchange services to the state, some safeguards are warranted. Indeed, we construe GTE's offer to accept certain conditions in this regard as conceding in effect that the unique circumstances in Hawaii justify special remedial treatment. *See*, discussion at paras. 61 and 62, below.

[42] *See* GTE Satellite Corporation, 84 FCC 2d 562 (1981), and para. 3 above.

[43] We have already determined in the Competitive Carrier Rulemaking Proceeding, *supra*, that the nationwide interexchange telecommunications market is comprised of AT&T, the domestic record carriers, the specialized common carriers (including SPCC), the domestic satellite carriers, resale carriers, and the miscellaneous common carriers. AT&T is by far the largest participant in this market with over 80.7% of the toll service revenues generated in 1980. For the same period, GTE had approximately 10%. However, this figure greatly overstates GTE's presence as a supplier of interexchange services because most of these revenues are for the provision of exchange access for toll services provided by AT&T. SPCC and MCI together accounted for a little over 1%. Source: S.REP. 170, 160–161, (97th Cong., 1st Sess., 1981) and GTE Statistical Supplement to 1981 Annual Report.

which now seeks to merge with an interexchange carrier. As such, the acquisition has characteristics of a non-horizontal merger. It is this potential vertical integration of GTE, the largest independent telephone company, and SPCC, a national interexchange carrier, which has engendered the greatest controversy in this matter. In the case of non-horizontal mergers, the *Guidelines* describe two primary areas of concern: (1) the possible elimination of an entrant who might otherwise be poised to enter the market on its own as a new competitor, but instead agrees to merge with a firm already in the market; and (2) potential competitive harm which might result after the merger, such as the facilitation of collusion, the evasion of rate regulation through discrimination or cross subsidy, and the creation of future barriers to entry.[44]

46. Even in the context of a concentrated market, the concern about elimination of potential competition through a non-horizontal merger arises solely when the acquiring firm (1) is the only, or practically the only, likely entrant, and (2) the firm could have entered on its own or by acquiring a small (toehold) firm rather than entering as a major competitor.[45] The first criterion is not satisfied here since there are numerous other potential entrants into interexchange telecommunications services. Moreover, several independent telephone companies have recently moved toward providing interexchange sevices outside their partnership arrangements with AT&T.[46] There would thus seem to be no barriers to future entry into the provision of interexchange services through resale; to the contrary, it seems reasonable to expect substantial entry and expansion through new satellite and terrestrial facilities.[47]

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[44] *See Guidelines* at para. 4503.

[45] *See, e.g.*, United States v. Marine Bancorporation, 418 U.S. 602 (1974); United States v. Falstaff Brewing Co., 410 U.S. 526 (1973); Tenneco v. Federal Trade Commission, 689 F.2d 346, 352–358 (2d Cir. 1982); Mercantile Texas Corp. v. Board of Governors of the Federal Reserve System, 638 F.2d 1255, 1264–72 (5th Cir. 1981); BOC International v. Federal Trade Commission, 557 F.2d 24 (2d Cir. 1977); Federal Trade Commission v. Atlantic Richfield Co., 549 F.2d 289 (4th Cir. 1977); Kennecott Copper Corp. V. Federal Trade Commission, 467 F.2d 67 (19th Cir. 1972), *cert. denied*, 416 U.S. 909 (1974); United States v. Phillips Petroleum Co., 367 F.Supp. 1226 (C.D. Cal. 1973), *aff'd mem.*, 418 U.S. 906 (1974); *Guidelines* at para. 4504.

[46] As examples, Rochester Telephone and Southland Telephone resell WATS through their affiliates; United Telephone has a controlling interest in ISA Communications, a resale carrier offering satellite digital communications services; Continental Telephone owns fifty percent of American Satellite; and Centel is participating in planning a network to connect cable companies in major metropolitan areas (Videopath).

[47] See, Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities, Docket No. 20097, 60 FCC 261 (1976), *recon.* 62 FCC 2d 588 (1977), *aff'd* AT&T v. FCC, 572 F.2d 17 (2d Cir.) *cert. denied*, 439 U.S. 875 (1978); Interconnection Arrangements Between and Among the Domestic and International Record Carriers, CC Docket No. 82–122, 91 FCC 2d 483 (1982); Report and

47. As for the companion concerns of *de novo* entry and toehold acquisition, entry into a market by acquiring a small firm in the market and expanding it into a substantial competitive force may have a procompetitive effect comparable to new entry. When the acquired firm has a market share of five percent or less, the Department of Justice has said it is unlikely to challenge the acquisition.[48] Here, as noted, SPCC has a *de minimis* share of the relevant market.[49] Therefore, when viewing this acquisition as non-horizontal, we do not see a substantial threat to competition.

48. This brings us to the remaining potential competitive problems arising from vertical mergers, such as the facilitation of collusion, the creation of barriers to entry, and the evasion of rate regulation.

49. Unquestionably, the proposed transfer of control would result in a GTE whose vertical structure resembles that of the current Bell System to the extent that the provision of domestic interexchange service would now be added to the local exchange, manufacturing and planning operations already offered by the holding company. Both MCI and SBS assert that this vertical configuration would be, on its face, anti-competitive and inimical to the public interest. Initially, petitioners claim the acquisition would allow GTE and its affiliates to favor SPCC in acessing the local network. Furthermore, according to MCI, GTE's proposed vertically integrated structure would allow it to discriminate against other intercity carriers seeking interconnection in its area of operations just as the Bell System operating companies were able to discriminate in the past against specialized carriers. Stated another way, MCI argues that allowing GTE to emulate the Bell System structure just struck down by the *Modified Final Judgment* (MFJ)[50] invites an obstruction to new potential entrants in the interexchange market. In addition, MCI fears that federal regulatory authorities will have as difficult a time closely monitoring GTE's activities for compliance with antitrust laws in the future as they have had in the past with AT&T.

50. Moreover, both MCI and SBS express concern that the acquisition would undermine this Commission's policies favoring equal local interconnection to all intercity carriers. In addition to

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Order, CC Docket No. 81–704, FCC 83–184, adopted April 27, 1983; Domestic Fixed-Satellite Transponder Sales, CC Docket No. 82–45, 90 FCC 2d 1238 (1982); Orbital Deployment Plan, 84 FCC 2d 584 (1981).

[48] *Guidelines* at para. 4504.

[49] *See* note 43 *supra*. Also, while GTE has entered and is expanding its satellite system, GTE has estimated that it would take at least three to four years to plan, construct, and make operational a nationwide microwave network. Our review of the applicable Hart-Scott-Rodino materials and experience with specialized carriers tends to confirm this assertion.

[50] U.S. v. AT&T, 552 F.Supp. 131 (D.D.C. 1982), *affirmed sub nom.*, Maryland v. U.S., ___ U.S. ___, 151 U.S. L.W. 3628 (U.S. Feb. 28, 1983).

requiring cost based, unbundled, and non-discriminatory tariffs, SBS would have the Commission require that joint billing, co-location or sharing of facilities, and any special access or access-related services be made available to SPCC only if it is made equally available to all other carriers. In a related argument, MCI also alleges that the proposed acquisition will promote cross-subsidization and evasion of rate regulation. It contends that GTE can artificially lower its interconnection charges to SPCC, thereby shifting monopoly profits from its regulated local carriers to its competitive long-distance carrier. Moreover, MCI is concerned that GTE will vary its allocation of the costs of local plant and interexchange plant as a means to impose SPCC's costs onto local ratepayers.

51. Finally, MCI alleges that the acquisition will facilitate collusion with AT&T and increase barriers to entry because of GTE's ownership of local operating companies. According to MCI, the ultimate aim of this acquisition is not competition, but leverage. Assertedly, the acquisition will enable GTE to use SPCC as a "bargaining chip" with AT&T regarding settlement revenues. Since GTE's portion of settlement revenues is quite large, MCI questions GTE's representation that SPCC will actually compete with AT&T. Instead it believes that GTE views MCI as its principal competitor and will accommodate AT&T so that it can preserve its "highly lucrative settlement arrangements." (Petition to Deny, at 4–6, 23–26, 93–99; Supplement to Petition to Deny, at 6–14).

52. We initially find no merit to the claim that the acquisition is anticompetitive on its face simply because GTE's proposed new structure would resemble that of the Bell System. As we see it, the critical question is not merely one of structure, but rather includes GTE's relative market share, and whether that share is likely to be used for anti-competitive ends. Significantly, there is a substantial difference in size between the current Bell System and the proposed combined GTE/SPCC. For the year 1981, AT&T's operating revenues were $58.1 billion while GTE/SPCC's combined revenues were $7.1 billion. *See*, Appendix C. AT&T provides nationwide service to all 50 states and the District of Columbia. By contrast, GTE offers local exchange services in portions of only 31 states and SPCC does not yet provide interexchange service to all 50 states. Moreover, as we construe the *MFJ*, it was AT&T's market power and exercise of that power rather than its structure standing alone which was dispositive. Thus, the Court emphasized that AT&T possesses great size and power and that it has used this in conjunction with its control over local operations as a leverage against its competitors. (*MFJ*, at 151–152, 161–165, 222–223). Additionally, the Court found that the American telecommunications industry is presently dominated by one company — AT&T — and that its domination is substantial (*Id.*, at 222, 163). For this reason, we cannot agree that the result in the

MFJ requires us to find that GTE's proposed vertical structure standing alone is unlawful.

53. MCI's alternative concerns about GTE's relative size in the local exchange market are also unpersuasive. MCI perceives that GTE will be comparable in size to the regional holding companies (RHCs) which will be established to provide, through subsidiaries, local exchange service after the break-up of AT&T. Assertedly, GTE's assets (gross plant) of more than $21 billion in 1981 almost double that of the smallest RHC and exceed by $3 billion the assets of the largest RHC. In fact, the RHCs are projected to have assets ranging from $16 billion to approximately $22 billion. *See* Appendix D. Clearly, therefore, MCI's claim that GTE will be the largest telecommunications company offering exchange services is not borne out by the record. Moreover, even if it were, we find the comparisons of little value. In operative effect, MCI has compared GTE's cumulative operations on a total *nationwide* scale with the RHCs' *regional* geographic operations. No showing is made, however, that any single area of GTE concentration would be comparable in size with that of any new RHC. Accordingly, we find these comparisons to be of little significance in evaluating the competitive effect of the proposed acquisition.

54. We also do not find reason for concern that the transfer is likely to give SPCC/SPSC a preference over other interexchange carriers. Under the proposed final judgment, GTE has agreed that its telephone operating companies will provide equal local exchange and information access to interexchange carriers on a schedule to be worked out with the Justice Department. See note 6 above. And, even if that proposed condition is not approved by the court, we believe certain other Commission policies will protect interexchange carriers vis-a-vis SPCC.

55. The potential for unequal treatment will be greatly diminished, if not eliminated, with the implementation of our recent access charge plan. *MTS and WATS Market Structure*, FCC 82-579, released February 28, 1983 (*Access Charge Order*). There, the Commission has set forth a plan to prescribe the compensation that exchange carriers should receive for origination or termination of all interstate and international services. Under the terms of that plan, GTE as well as other exchange carriers are required to file tariffs utilizing the same rate structure for like access service. We fully intend as part of our tariff review process to examine whether each carrier has complied with the anti-discrimination provisions of the Communications Act, 47 U.S.C. § 202(a). In addition, interested persons will have the right to petition against these tariff filings and bring to our attention any proposed tariffs they believe likely to result in an unjust discrimination or preference.[51]

[51] The access charge order also calls for a creation of an Exchange Carrier

56. We recognize that this plan standing alone will not eliminate all the current inequities with respect to interconnection arrangements. For example, our order does not specifically require that independents provide equal quality access as the *MFJ* requires of the RHCs. We have, however, instituted a rulemaking to address equal interconnection and we think that it is the appropriate forum to resolve this industry-wide problem. *MTS and WATS Market Structure*, Phase III, FCC 83-178, released May 31, 1983. In the meantime, recognizing that quality differences in interconnection arrangements would give a substantial advantage to the traditional interexchange partnership (predominantly, AT&T), we have ordered that access pricing for these services provided by AT&T and the independents be "adjusted to account for quality differences until equal interconnection is available to all interexchange carriers". *Access Charge Order* 82-579 *supra*, para. 151. At the same time, the *Access Charge Order* takes strong measures to eliminate the potential for cross-subsidization. In addition to requiring equal prices for identical access, the order requires local exchange carriers to offer billing services to all interexchange carriers if they offer billing services to any (*Id.* at para. 191). Furthermore, with regard to cross-subsidization, GTE has represented in this proceeding that it intends to maintain a "basic organizational separation between SPCC/SPSC and the GTE Telephone Operating Companies." GTE letter of April 8, 1983. To this end, GTE and SPCC/SPSC will maintain their own separate books of accounts, and will not jointly offer services with the operating telephone companies. Nor will GTE provide to SPCC/SPSC the use of facilities on any basis other than that provided to any OCC. This seems reasonable and we will impose it as a condition to enable us to monitor for potential cross-subsidization. For all these reasons, we believe there will be adequate safeguards in place to ensure that GTE does not favor SPCC/SPSC over any other carrier for like access services.

57. We also fail to see how approval of this transfer will create barriers to entry. We find no support for MCI's assertion that a carrier's inability to obtain authorizations to offer local exchange service in GTE's *local exchange* areas is an inhibiting factor on potential entrants to the interexchange market. Our experience over the past decade seems to show just the opposite. Over this period of time, there have been a large number of new entrants providing interexchange service on a national scale even though AT&T has

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Association (ECA) to compute charges and prepare and justify the tariffs on behalf of all participating carriers. MCI claims that a conflict of interest exists for GTE because it will be a participant in the ECA and also operate as an interexchange carrier. To repeat, however, GTE has represented to the FCC and has signed an agreement with DOJ that it will maintain SPCC/SPSC separately from the operating companies. In any event, no officer of GTE's interexchange subsidiary would be selected as an ECA director. *See also*, MTS and WATS Market Structure, CC Docket 78072, Phase I, FCC 83-252, released May 31, 1983.

had local monopolies in many more areas than GTE. In addition, as explained, we expect the adoption of access charges applied uniformly to all interexchange carriers will further reduce preexisting barriers to entry because new interexchange carriers will be treated on the same basis as the existing OCCs.[52]

58. Finally, MCI stresses GTE's involvement in several anticompetitive activities[53] as a basis for denying the transfer. MCI maintains that GTE has discriminated, and will continue to discriminate, against MCI and other interexchange carriers in its attempt to preserve the present GTE/AT&T relationship. Also MCI notes that in *GTE-Telenet Merger*, 72 FCC 2d 111 *recon.*, 72 FCC 2d 516, *recon. denied*, 84 FCC 2d 18 (1979) the Commission recognized GTE's potential for anticompetitive conduct and initially imposed ten conditions to help insure that Telenet would continue to operate in the public interest. Although acknowledging that the Commission eventually removed the conditions, MCI is not persuaded that anticompetitive harm will not recur.

59. We initially considered GTE's potential for misconduct in *GTE-Telenet Merger*, *supra*, and attached several conditions to our approval as a means to prevent harm to the public. Recently, however, we removed the merger conditions. *GTE-Telenet Monitoring*, 91 FCC 2d 215 (1982). We found sufficient record evidence that GTE is no longer motivated to accommodate AT&T in enhanced service markets or satellite services, two areas of potential competition between GTE and AT&T. 91 FCC 2d at 220. Also, we removed the structural separations requirements regarding GTE's offering of enhanced services, after carefully considering GTE's relative size, its dependence on AT&T's interexchange facilities, the disproportionate costs of separation for small companies and the public interest in promoting GTE's ability to compete with AT&T in data communications services. *Second Computer Inquiry* (reconsideration), 84 FCC 2d 50, 72-75 (1980).[54]

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[52] As to MCI's related collusion argument, GTE asserts that it would not be willing to make such a large investment in SPCC if it did not intend to compete with AT&T as well as MCI. Furthermore, the new access charge rules will reduce substantially the amount of revenues that GTE will receive from AT&T for its participation in the provision of MTS/WATS services. Thus, there appears to be no advantage for GTE to discriminate against other carriers in favor of AT&T. *See also* discussion in paras. 55-56 above.

[53] ITT v. GTE, 449 F. Supp. 1158 (1978) (GTE found to be in violation of Section 1 of the Sherman Act by its unreasonable restraint of trade in the telecommunications equipment market); In re Tele-Cable, 19 FCC 2d 574 (1969) (GTE found to have misused monopoly position in a particular geographic area to engage in anticompetitive conduct in the provision of communications services); American Satellite Corp., 73 FCC 2d 317 (1979), Docket No. 20201 (Hawaiian Telephone Company found to have discriminated against American Satellite in favor of AT&T).

[54] MCI also asserts that cellular systems are another area where AT&T and GTE are colluding. This assertion is not well-taken. As we noted in GTE-Telenet

60. The question, therefore, is whether MCI has raised any new evidence of anticompetitive pattern of conduct beyond that already considered by the Commission or the courts. As best we can ascertain, the only pending issues against GTE yet to be resolved are those allegations which MCI is pressing in its antitrust suit against AT&T and GTE.[55] The issues raised there have not yet been adjudicated. In these circumstances, to deny the transfer or impose additional conditions merely on the strength of the pleadings in that case would be premature.

61. We may now address the special situation in the state of Hawaii. By way of background, in its original petition to deny, Hawaii expressed the fear that the acquisition would have the same anticompetitive effects in the state of Hawaii as others claimed it would have in the continental United States. Hawaii stressed that presently GTE is the only carrier serving what it denotes as the "Hawaii-Mainland interexchange private line services and satellite marketh' and that the only other carriers planning to enter this market are SPCC and SPSC. The proposed acquisition, it contended, would therefore eliminate the independence of SPCC and SPSC, and any promise of effective competition, increased service offerings and lower rates in the Hawaiian market. Consequently, the state requested that the application be denied unless certain conditions were imposed.[56]

Monitoring, *supra*, we have strongly urged wireline carriers to reach agreements to avoid mutually exclusive situations as a means to speed service to their communities. *See also*, Advanced Mobile Service, Inc., FCC 83-124, released April 26, 1983.

[55] *See*, MCI Communications Corporation v. AT&T (No. 79-1182 D.D.C.). There MCI claims that GTE conspired with the other independents and AT&T to monopolize the intercity telecommunication services market in violation of Section 2 of the Sherman Act, and to unreasonably restrain trade in that market in violation of Section 1 and 3 of the Sherman Act. In particular, MCI has alleged that GTE participated with the other defendants in meetings, discussions, and conversations in which they agreed, *inter alia*: (1) to allocate to AT&T substantially all segments of the intercity telecommunications market; (2) to distribute illegal profits by means of the settlement procedure whereby AT&T significantly overpaid GTE and the other independents for local interconnections at a rate far exceeding their costs; (3) to exclude MCI and other potential competitors from substantial segments of the intercity market by concerted refusals to deal; (4) to deny or restrict local interconnections requested by MCI and thereby discriminate against MCI and in favor of AT&T; and (5) to set charges for certain types of local interconnections at unreasonable and discriminatory levels.

[56] Specifically, Hawaii has requested that the following three conditions be imposed upon GTE:

(1) SPCC, SPSC, GTE, shall each include Hawaii in any interexchange telecommunications service offering that is available on the United States Mainland under the same rate structure which applies on the United States Mainland.

(2) SPCC shall extend to Hawaii, as quickly as feasible, all the services it provides in the United States Mainland at the date of the acquisition,

62. In response, GTE averred that if the application were approved SPCC would extend all of its services to Hawaii as represented in SPCC's recent 214 authorization. Subsequently, applicants and the state on their own initiative began discussions to consider possible revisions to the conditions proposed by Hawaii. As a result, GTE notified Hawaii and the Commission of its willingness to accept as a condition of the acquisition a revised version of the conditions submitted by Hawaii. GTE's proposed conditions would, among other things, guarantee that SPCC/SPSC would provide service to the state under the same rate structure applicable on the mainland and that SPCC/SPSC, would, as quickly as possible, provide all its services to Hawaii. However, by letter dated March 31, 1983, Hawaii has informed GTE and the Commission that the proposed revisions are not in fact acceptable to the state. Among the principal reasons given is that the proposed conditions apply only to SPCC and SPSC and are not applicable to GTE and its affiliates. Hawaii maintains that this limitation provides GTE with an opportunity to circumvent the conditions by simply causing services to be offered by GTE and its existing affiliates (e.g. Hawaiian Telephone or GTE Satellite Corp.) rather than SPCC and SPSC.

63. As stated, the central reason behind Hawaii's request that conditions be imposed is to assure competition is fostered in that state. Initially, in this regard, we observe that there no longer appear to be any regulatory barriers to prevent any entity from entering the Hawaiian-Mainland area to offer various communications services. Currently, eight authorized satellite carriers are capable of providing service to Hawaii.[57] Although many of these carriers serve Hawaii with only a limited number of transponders, undersea cables also serve the state. Moreover, the Commission has lifted restrictions on the international record carriers to permit them to offer voice services to Hawaii.

64. Against this background, we think the revised conditions submitted by GTE will be adequate to assure that the benefits of competition reach the state of Hawaii. Moreover, in order for GTE to later circumvent its proposed conditions by offering service presently

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including, but not to limited to SPRINT services and point-to-point private line service under the same rate structure that applies on the United States Mainland.

(3) GTE and SPCC shall make available to Hawaii regulatory authorities any and all (1) agreements, (2) cost and revenue accounting data and (3) all other relevant information requested by these governmental authorities necessary for state regulatory purpose that relates to telecommunications or to any transaction with affiliates that provide regulated telecommunications.

[57] These include large carriers such as RCA, Western Union Westar, AT&T and GTE, and smaller ones such as Hughes, American Satellite Company, Advanced Business Communications and United States Satellite Systems, Inc. *See* Appendix E for a list of other carriers, including resellers, whose services may be used to and or from Hawaii.

offered by SPCC through another subsidiary, GTE would be required to obtain a discontinuance from the Commission under Section 214 of the Act. Should that occur, Hawaii at that time would be free to show that the state's needs would be harmed. In the meantime, however, we are satisfied that these conditions, as set out in the ordering clauses, will adequately meet Hawaii's immediate concerns by assuring that SPCC/SPSC will provide new services to Hawaii without unnecessarily constraining GTE's ability to react to the competitive marketplace in the future. Furthermore, these conditions will continue to foster the Commission's policy of integrating Hawaii into the mainland rate structure.[58]

65. *Effect on satellite authorization policy.* Several parties contend that the acquisition of SPSC by GTE will result in the inefficient utilization of limited orbital and spectrum resources. In this regard they believe the acquisition would result in a concentration of limited resources controlled by a vertically integrated corporate entity which possesses monopoly power in many local service areas. They allege further that the acquisition will violate current Commission policy which limits new satellite carriers to a maximum of two operational satellites until the carrier can demonstrate the need for more capacity based on actual operating experience. *See, Orbital Deployment Plan*, 84 FCC 2d 584, 603 (1981). Specifically, the parties asserts that the acquisition will allow the newly merged entity to have between 9 and 11 assigned orbital locations, or approximately 40% of the available Ku-band orbital positions at 12/14 GHz. The parties stress that at present there are 16 domestic satellites at 14 orbital locations owned by only 4 licensees.

66. We find no basis for concern that the transfer will result in impermissible concentration. To repeat, we have already determined that satellite and terrestrial communications do not constitute a distinct submarket. As a separate matter, we have recently had an opportunity to review thoroughly our domestic fixed satellite policies and act on pending applications. In the *1983 Orbital Assignment Order, supra*, the Commission has expanded the number of available orbital locations in both the 4/6 GHz band and the 12/14 GHz band by reducing spacing between satellites.[59] Furthermore, in another order adopted the same day, the Commission, among other things,

[58] *See* Ordering Clauses, 69(4) to 69(5). We have ordered, as conditions to the acquisition, the first of two of the three conditions set out in note 57 above the substance of which have been accepted by GTE. It is our opinion that the third condition offered by GTE regarding submission of certain information to Hawaiian regulatory authorities involves issues that would be best resolved by the proper state authorities. Accordingly, even if it is assumed we could properly order GTE to make submissions to state regulatory agencies, we will not impose this condition upon GTE.

[59] See, Orbital Deployment Plan, 84 FCC FCC 2d 584, 603 (1981) and Report and Order in CC Docket 81-704, FCC 83-187, adopted April 27, 1983, at paras. 83-84.

has approved an application authorizing SPSC to launch its on-ground spare and to construct one additional satellite.[60] Thus, GTE and SPSC will collectively operate only 5 of the 38 satellites whose launches have been approved. This figure would represent less than 13.27% of the total number of satellites currently authorized. Indeed, this figure is not unusual when compared to the number of satellites authorized to other independent operators. Additionally, as a result of the recent authorization orders, four new entities have been authorized to build their own satellites. Consequently, even with this acquisition we expect the recent authorizations will increase the number of competing systems in this field to ten. Even if it were assumed the separate subsidiary structure were not effective and GTE was controlling and operating five satellites, we do not believe that would be a *prima facie* anticompetitive concentration.[61]

67. Nor are we persuaded that the proposed transfer will lead to inefficient use of orbital locations and therefore violate Commission policies. The Commission's policies against the "warehousing" of orbital locations apply to established, as well as new, entities. They are designed to prevent an entity from acquiring, or retaining, orbital spectrum on the basis of speculative demand at the expense of other potential users. In approving a third orbital location for SPSC, we noted its representations that all of the transponders on its first two satellites are essentially committed. We expressly conditioned launch of the third on the satellite being constructed by December 3, 1984, and launched by March 1, 1985. Further, the Commission stated in the accompanying *Report and Order* in Docket 81–704, FCC 83–184, at paras. 83–84, that a licensee's failure to satisfy prescribed traffic fill requirements could lead to relocation of a launched satellite and termination of the orbital assignment. Simply put, GTE and SPSC will continue to be subject to these requirements.

68. In a related argument covering spectrum utilization, SBS points out in its comments that GTE and SPCC have filed applications to construct extended network Digital Electronic Message Service systems (DEMS) and that the proposed networks contain 15 cities in which both propose to construct facilities. It urges that if the proposed acquisition is approved, GTE would be in violation of the Commission's *DTS* decision, Digital Termination Systems, 86 FCC 2d 360 (1981), to the extent that that order prohibits carriers from

[60] Southern Pacific Satellite Co., FCC 83–186, adopted April 27, 1983.

[61] GTE has pending an application to launch a third in-orbit satellite. Because this application was filed subsequent to our 1982 Processing Order in Domestic Fixed Satellite Service, 90 FCC 2d 1 (1982), *recon. denied*, FCC 83–183, adopted April 27, 1983, it is not presently clear whether they will receive an additional orbit assignment. *See* Report and Order, in CC Docket 81–704, FCC 83–184, adopted April 27, 1983 at paras. 73–78 and Memorandum Opinion and Order, FCC 83–185, adopted April 27, 1983.

obtaining a second channel (SPCC's in this case) until they have demonstrated they are operating their first pair of channels (GTE's) at or near capacity. In its opposition, GTE acknowledges this potential conflict and implies that upon consummation of the proposed acquisition, it will take the necessary steps to remain in compliance with the Commission's *DTS* order. Accordingly, we will order GTE to take necessary action on its pending DEMS applications within 60 days of the release of our decision on the transfer.

69. One final matter remains. As noted, the applicants seek a general authorization under Section 212 of the Act to permit interlocking directorates between GTE and SPCC/SPSC. No specifics are provided as to which officers or directors of GTE would be affected. In any case, in view of the provision in the proposed final judgment which limits interlocking directorates to the Chief Executive Officer and the President of GTE Corp. respectively (note 6, above) we see no purpose in approving any further interlocking directorates at this time.

CONCLUSION AND ORDERING CLAUSES

70. In sum, we find that GTE is qualified to acquire, and infuse new capital into SPCC/SPSC without harm to its other telephone operations. Additionally, we find that transfer of SPCC/SPSC's common carrier authorizations and radio licenses to GTE, as conditioned below, would likely promote competition and thus benefit the public in terms of potentially more service choices at lower rates. GTE/SPCC/SPSC will have the structure, resources, and market position to plan, implement, and maintain improved facilities, interconnection arrangements, and services more efficiently than each would as separate entities. The result may be more efficient use of facilities, including scarce spectrum and satellite resources. Therefore, we conclude that the public interest, convenience, and necessity would be served by grant of the application.

71. Accordingly, having found this transfer is in the public interest, IT IS ORDERED, pursuant to 47 U.S.C. §§ 151(i) 212, 214, 308, 309, and 310 that the application of GTE Corporation and Southern Pacific Company for consent to transfer the radio and microwave licenses and common carrier authorizations of Southern Pacific Company IS GRANTED, subject to the following terms and conditions:

(1) All existing terms and conditions applicable to the authorizations held by SPCC and SPCC shall remain in full force and effect.

(2) The GTE Corp. IS AUTHORIZED pursuant to Section 214 of the Communications Act to acquire and operate the domestic channels of communication currently operated by SPCC and SPSC as described in the application.

(3) SPCC and SPSC shall maintain their accounting records separate from those of other GTE companies and affiliates. These books and records of account shall be maintained in accordance with FCC accounting requirements and shall fully disclose

the actual costs and revenues attributable to the communications services provided by SPCC and SPSC. Further, SPCC and SPSC shall obtain services, facilities and equipment from other GTE companies or affiliates on the basis of an arms length relationship which reflects the terms, prices and conditions which would be available to any non-affiliated common carrier.

(4) GTE will cause SPCC, SPSC or any present or future subsidiary of SPCC or SPSC, and any successor organization, to include the state of Hawaii in any interexchange telecommunications service offering that is available on the United States Mainland to metropolitan areas equivalent in size to the Honolulu metropolitan area, and such offering shall be included in the same rate structure which applies on the United States Mainland.

(5) GTE will cause SPCC or any successor organization to extend to Hawaii as quickly or as soon as operationally feasible under the same rate structure that applies on the United States Mainland, all the SPRINT services SPCC provides on the United States Mainland at the date of the acquisition. GTE will also cause SPCC or any successor organization to extend to Hawaii as soon as operationally feasible point-to-point private line service under the same rate structure that applies on the United States Mainland. SPCC and any successor organization shall continue to provide all such services under the same rate structure that applies on the United States Mainland as long as such service is available from SPCC or any successor organization to metropolitan areas equivalent in size to Honolulu on the United States Mainland.

72. IT IS FURTHER ORDERED That, pursuant to § 212 of the Communications Act, 47 USC § 212, GTE, SPCC, and SPSC may have the Chief Executive Officer and the President of GTE Corp. as interlocking directors, subject to the provisions of Section 62.21 of the Commission's Rules, 47 CFR § 62.21.

73. IT IS FURTHER ORDERED That the Motion for Reciprocal Treatment of Discovery Material filed by MCI Telecommunications, Inc. is DENIED.

74. IT IS FURTHER ORDERED, That GTE will amend its applications, discussed in paragraph 68 above, within 60 days of the release of this decision.

75. IT IS CERTIFIED, That the transfer of facilities approved in this order, subject to the conditions specified, WILL SERVE the public interest, convenience, and necessity.

76. This order shall be effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Appendix A

Application for Consent to Transfer Control

-GTE Corporation and Southern Pacific Company

Comments and Petition to Deny

-MCI Telecommunications Corporation: Petition to Deny
-State of Hawaii: Petition to Deny Unless Conditioned
-American Satellite Company: Comments

–Satellite Business Systems: Comments
–U.S. Telephone Communications, Inc.: Opposition

Opposition

–GTE Corporation and Southern Pacific Company

Replies

–MCI Telecommunications Corporation
–State of Hawaii
–American Satellite Company
–Satellite Business Systems
–U.S. Telephone Communications, Inc.

Supplemental Pleadings/Filings

–MCI Telecommunications Corporation: Supplement to Petition to Deny
–GTE Corporation and Southern Pacific Company: Opposition to MCI's Supplement to Petition to Deny
–GTE Corporation: Supplement to Application in Response to Commission Request; March 17, 1983
–MCI Telecommunications Corporation: Comments on Supplemental Information Supplied by GTE Corporation on March 17, 1983
–GTE Corporation: Submission of Proposed Conditions
–State of Hawaii: Response to Proposed Conditions Submitted by GTE Corporation
–GTE Corporation: Supplement to Application in Response to Common Carrier Bureau's Request for Additional Information; April 8, 1983
–MCI Telecommunications Corporation: Comments on Supplemental Information Supplied by GTE Corporation on April 8, 1983
–GTE Corporation: Submission of Additional Information Regarding Banks Providing GTE Corporation with Credit Lines

Appendix B

Summary of GTE Capital Spending Projections
($ billion)

I. *Sources of Financing*

	1983			*1983–1987*		
	Without SPCC/SPSC	*With SPCC/SPSC*	*Change*	*Without SPCC/SPSC*	*With SPCC/SPSC*	*Change*
Total	$3.219	$4.128	+$0.909	$19.87	$23.16	+$3.29
Internal	$2.581	$2,649	+$0.068	$18.02	$20.01	+$1.99
External	$0.638	$1.479	+ 0.841	$ 1.85	$ 3.15	+$1.30

II. *Telco Operations Only—1983–1987*

Gross Additions

1983	$ 2.3
1987	3.5
1983-1987	15.0

Net Additions[1]

1983	$ 2.2
1987	3.3
1983-1987	14.3

[1] Includes removal costs, salvage, etc.

Average Annual Increase 1983-1987

Gross Additions	11.0%
Net Additions	10.5%

III. *GTE Consolidated Operations (without SPCC/SPSC)—1983-1987*

Total Capital Requirements

Telcos	$14.3
Other GTE	5.6
Total GTE	19.9
Ratio - Telco/Total GTE	72%

Percent External Required

1983	20.0%
1987	0.7%
1983-1987	9.0%

IV. *GTE Consolidated Operations (with SPCC/SPSC)—1983-1987*

Total Capital Requirements

Telcos	$14.3
SPCC/SPSC	2.4
SPCC/SPSC Acquisition	0.7
Total SPCC/SPSC	3.1
Other GTE	5.7
Total GTE	$23.1

Ratios

Telco Spending to Total GTE	62%
SPCC/SPSC to Total GTE	13%
SPCC/SPSC to Telco	23%

Percent External Required

1983	36%
1987[2]	0%
1983-1987	14%

Debt-Equity, Ratio

1982	56.3%
1983	57.8%
1987	49.0%

[2] Overall GTE operations projected to generate positive cash flow in 1987.

Appendix C

AT&T - GTE COMPARISON[1]

Category	*AT&T in 1981*	*GTE or SPCC in 1981*[2]
Plant (less depreciation)	$121.3 billion (Bell System)	$17 billion
Local Operating Revenues	$26.3 billion (Bell System)	$2.6 billion
Toll Operating Revenues	$30.9 billion (Bell System)	$4.1 billion (GTE thru settlements and SPCC combined)
Interstate Operating Revenues	$4.1 billion (Long Lines) (after settlements and division of revenues)	SPCC - $235 million
Distances covered	725 million miles of telephone Channel Carrier for Long Lines	SPCC - 46 million circuit miles microwave network
Net Income	$6.8 billion excl Long Lines) $.67 billion (Long Lines)	GTE - $722 million SPCC - $167.7 million
Long Distance Messages	87.7 million per day (Bell System)	5.9 million per day

Appendix D

Total Company Assets' Comparison

*Regional Holding Companies ** *(as of December 31, 1981, prior to BOC reconfiguration in accordance with the Decree)*	*Total Assets in millions*
Northeast	$17,778.6
Mid Atlantic	17,267.3
Southeast	21,800.4
Midwest	17,038.4
Southwest	15,949.3
Mountains and Great Plains	16,109.1

[1] In its Petition to Deny, MCI submitted a table comparing AT&T in 1960 with GTE in 1981. However, MCI provided no sources for the information included in the table. The source of the information contained in this table on AT&T is FCC Statistics of Common Carriers for 1981 and Long Lines Statistics.

[2] Source: MCI's petition to deny, with the exception of Net Income. In GTE's 1981 Annual Report net income was reported to be $722 mil. MCI reported GTE and SPCC combined net income to be $722 mil. For purposes of this chart, we have employed GTE's Annual Report.

Far West	16,573.4
General Telephone and Electronics Corp. **	
Telephone Operations	17,411
Electrical Products	1,348
Communications Products	1,769
Telenet Communications	138
Parent Company and Other	447
TOTAL	21,113

*Information obtained from Plan of Reorganization, page 460, filed in connection with *U.S. v W.E. and AT&T*, Civil Action No. 82-0192.
**Information obtained from GTE's 1981 Annual Report.

Appendix E

Carriers Providing Communications Service To and/or From Hawaii

American Telephone and Telegraph Company
Hawaiian Telephone Company
ITT Worldcom
RCA Americom
RCA Globcom
Western Union International
Western Union Telegraph Company

American Interstate Communications, Inc.
Compusulants, Inc.
Comtel Industries, Inc.
DHL Communications, Inc.
Energy Communications Corporation
GTE Telenet Communitations-Packet Switched Data
Hilton Hotels Corporation
Industry Hills Visitor Accommodation Partnership
JSL/Toll Management Systems, Inc.
Long Distance/USA, Inc.
Pacnet Communications Corporation
Rotelcom Incorporated
Telecommunications Facilities Management, Inc.
Telephone Warehouse, Inc.
Tel Systems Management Corporation
U.S. Telephone
U.S. Telephone of the Midwest
U.S. Tel of the West
U.S. Tel of the Northeast

Reconsideration, Petition for, Denial of

Petition for reconsideration of *Henry C. Armstrong*, III, FCC 83R-16, 53 RR2d 474 (Rev. Bd. 1983) denied. Petitioner essentially reargues the points previously made before the Board.
–Henry C. Armstrong, III
PR Docket No. 81–826

FCC 83R–36

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of Revocation of License of	
HENRY C. ARMSTRONG, III 15640 Larkspur Sylamr, California 91342	PR Docket No. 81–826
Licensee of Station WA6CGI in the Amateur Radio Service	
Suspension of License of	
HENRY C. ARMSTRONG, III 15640 Larkspur Sylmar, California 91342	PR Docket No. 81–827
Amateur Advanced Class Operator License	

MEMORANDUM OPINION AND ORDER

(Adopted: May 11, 1983; Released: May 13, 1983.)

BY THE REVIEW BOARD:

1. In a Decision, 53 FCC 2d 485, 53 RR 2d 474 (Rev. Bd. 1983), the Review Board affirmed the Initial Decision of Assistant Chief Administrative Law Judge Thomas B. Fitzpatrick (ALJ), which revoked the license of Henry C. Armstrong, III for Radio Station WA6CGI in the Amateur Radio Service and suspended his Advanced Class Operator license for the remainder of its term. Now before the Board are a petition for reconsideration of that Decision filed April 11, 1983, by Armstrong and an opposition by the Chief, Private Radio Bureau.

2. In his *pro se* petition Armstrong requests an informal oral argument or "talk" to "resolve any misunderstandings" between himself and the Commission and urges that the Board immediately dismiss the proceedings against him or, alternatively, extend his

operating privileges past their present expiration date of June 9, 1983, pending the outcome of this proceeding, or grant him an outright renewal of his licenses. On the merits, Armstrong continues to dispute the conclusions of the ALJ (and now the Board) that he caused wilful interference to an Amateur repeater operated by the Southern California DX Club in December 1980. He maintains that he is being victimized by the DX Club, that testimony presented against him by Club members was inaccurate and biased, that his program logs would substantiate his testimony and should have been admitted into evidence at the hearing or reviewed by the Board, and that a videotape that was not admitted into evidence would prove that his interfering RAMAR computer system exists and is a viable communications concept.

3. The Board will deny Armstrong's petition. The granting of oral argument in Commission proceedings is discretionary, not a matter of right, *e.g.*, Section 1.277(c) of the Commission's Rules, 47 CFR 1.277(c), and no formal request for an argument has hitherto been made in this forum. This is a formal adjudicatory proceeding charged with the solemn responsibility of deciding whether Armstrong's Amateur licenses should be revoked or suspended. There is no place at the appellate level for the informal chit-chat that Armstrong seems to envision, and the Board does not believe that an oral argument will contribute to the further elucidation of the matters at issue. To extend his operating privileges, Armstrong must file timely renewal applications for his licenses, in accordance with Sections 97.13 and 97.47 of the Rules, 47 CFR 97.13 and 97.47, which will then be processed in the context of this proceeding by other offices of the Commission. The requested relief cannot be granted by the Board. As to Armstrong's substantive arguments, they are essentially rehashes of his exceptions or new and conclusory snipes at the record evidence. We need not grant reconsideration merely to reargue matters previously considered and resolved. *WWIZ, Inc.* 37 FCC 685 (1964), *aff'd sub nom. Lorain Journal Co.* v. *FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966). And Armstrong's sniping observations concerning the DX Club and its witnesses' testimony are untimely and insufficiently elaborated to call into question the findings and conclusions related to that testimony. *See Initial Decision*, *supra*, Conclusions at paras. 4–5, in which the ALJ specifically credited the challenged testimony; *KFPW Broadcasting Co.*, 44 FCC 2d 310, 28 RR2d 1644 (1973).

4. ACCORDINGLY, IT IS ORDERED, That the petition for reconsideration filed by Henry C. Armstrong, III on April 11, 1983, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
JEROLD L. JACOBS, *Member, Review Board*

NOTE: Pursuant to Section 1.102(a) of the Rules, 47 CFR 1.102(a),

the revocation and suspension affirmed herein become effective 40 days after the release date of this Memorandum Opinion and Order, unless an application for review is filed within 30 days, in which case the effective date will be suspended pending further order of the Commission. Immediately upon the effective date of this Memorandum Opinion and Order, the licensee shall forward to the Commission the licenses revoked and suspended. Operation of the Amateur Radio Station herein after the effective date will be in violation of Section 301 of the Communications Act of 1934, as amended, and will subject any person in violation to the penal sanctions specified in Section 501 of the Communications Act. A copy of this Memorandum Opinion and Order shall be served by Certified Mail, Return Receipt Requested, on Henry C. Armstrong, III at his last known address, 15640 Larkspur, Sylmar, California 91342.

Satellite Domestic Communications
Satellite Launch Authority
Satellite Orbit

Application to construct and launch an additional space station in Domestic Fixed Satellite Service granted to meet licensees current traffic projections. Proposal consistent with Commission's policies and serves the public interest, convenience and necessity.
–Hughes Communications, Inc.

FCC 83–190

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of the Application of HUGHES COMMUNICATIONS, INC. For Authority to Launch and Operate a Space Station in the Domestic Fixed-Satellite Service and Sell Transponders on a Noncommon Carrier Basis	File Nos. 2115-DSS-LA-81 995-DSS-MP/ML-(3)-82

ORDER AND AUTHORIZATION

(Adopted: April 27, 1983 Released: August 3, 1983)

BY THE COMMISSION: COMMISSIONER JONES ABSENT

1. The Commission is considering the above-captioned application submitted by Hughes Communications, Inc. (HCI) to launch and operate its third in-orbit domestic communications satellite. Public notice of this application was given on October 7, 1981. A petition to deny was filed by Western Union Telegraph Company (Western Union). American Satellite Corporation (ASC), RCA American Communications (RCA Americom), Southern Pacific Communications Company (SPCC) and Satellite Syndicated Systems (SSS) also filed comments.[1] For the reasons discussed below, we deny this petition and grant HCI's application.

2. HCI is a wholly-owned subsidiary of Hughes Aircraft Compa-

[1] We are also considering the applicant's previously deferred request to sell transponders on its third in-orbit satellite on a noncommon carrier basis. *See* Domestic Fixed Satellite Transponder Sales, 90 FCC 2d 1238 (1982). Petitions to

ny which is experienced in the construction of satellite space and earth stations. In 1980, the Commission authorized HCI to construct three domestic communications satellites and launch two of them.[2] Each of these three satellites contains 24 transponders, each with a bandwidth of 36 MHz. They are designed to operate in the 4/6 GHz frequency bands. The first of HCI's satellites (Galaxy I) is scheduled for launch in June 1983 and the second (Galaxy II) is scheduled for launch in September 1983. Construction of the third satellite (Galaxy III) is to be completed by January 1984. HCI proposes to launch this satellite in July 1984 and states that it will have a mission lifetime of 9 years. HCI requests an assignment of a second 50 state coverage orbital location for its third satellite. The investment costs, including launch, for Galaxy III are $87,706,000. HCI indicates that the necessary financing will be provided by Hughes Aircraft.[3]

3. In support of its application, HCI contends that demand for transponders on its satellites has been sufficiently strong as to warrant the need for the launch and operation of HCI's third satellite. HCI argues that it has sufficient customer orders and requests to fill transponder capacity on all three satellites. According to the applicant, all transponders on Galaxy I have been dedicated to transmission of video services and will be occupied fully.[4] Moreover, at the time that this application was filed HCI claimed to have a considerable backlog of requests for additional transponders which exceeds the capacity of Galaxy II. HCI has also requested authority to sell all the transponders on Galaxy III on a noncommon carrier basis. In fact, HCI recently announced plans to sell 24 transponders on the Galaxy II and III satellites to MCI.[5]

4. In their pleadings, Western Union and SPCC question whether HCI has provided the Commission with sufficient demand projections to warrant the assignment of an additional orbital position. Also, RCA Americom and SPCC question HCI's need for an orbital position capable of serving all of 50 states. Other issues raised with respect to the processing of HCI's launch application are fully resolved in the *Report and Order* om CC Docket No. 81–704, FCC 83–184, and *1983 Orbit Assignment Order*, FCC 83–186, both adopted today, and we will not repeat that discussion here.[6]

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deny HCI's request to sell these transponders in File No. 995-DSS-MP/ML-(3)-82 were filed by Wold Communications, Inc., Hughes Television Network and Satellite Syndicated Systems.

[2] Hughes Communications, Inc., 84 FCC 2d 578 (1981).

[3] Hughes Aircraft's qualifications to finance the construction of a domestic satellite are a matter of record before the Commission and are not at issue in this proceeding. *See also* National Satellite Services, 43 FCC 2d 1141 (1973), Hughes Communications Services, Inc., FCC 79–809, released December 10, 1979.

[4] HCI previously received authority to sell transponders on Galaxy I and II. *See* Domestic Fixed Satellite Transponder Sales, *supra* note 1.

[5] *See* letter from HCI, February 15, 1983.

5. In related action taken today, we have reduced orbital spacings between domestic satellites in the 4/6 GHz bands in response to the increased demand for satellite service. *See Report and Order, supra.* Under our new spacing criteria, we were able to provide orbit positions to all applications in the current processing group under our open entry domestic satellite licensing policies. Therefore, we are now able to assign HCI a third orbit position without the need to resort to a comparative hearing. Since HCI's qualifications are not questioned, the only remaining issue is whether the demand for HCI transponders warrants the award of a third orbit location. It has sold almost all the transponders on GALAXY I and at least 24 of the transponders on GALAXY II and III. Therefore, we believe that the representations of HCI provide adequate public interest demonstration for a third orbital assignment at this time. Moreover, we reserve the authority to require colocation of GALAXY satellites to reduce or eliminate excess spare capacity if these service requirements do not materialize. Also, for the reasons set forth in our *Report and Order, supra,* and in *Domestic Fixed Satellite Transponder Sales, supra* note 1, we are providing HCI with authority to sell up to 24 transponders on GALAXY III on a noncommon carrier basis.

6. Accordingly, IT IS ORDERED that Application File No. 2115-DSS-LA-81 IS GRANTED, and Hughes Communications, Inc. IS AUTHORIZED to launch and operate a third in-orbit satellite in the domestic Fixed-Satellite Service in accordance with the *1983 Orbit Assignment Order,* FCC 83–186, adopted today.

7. IT IS FURTHER ORDERED that Hughes Communications, Inc. shall comply with all the requirements of the *Report and Order,* FCC 83–184, and *1983 Orbit Assignment Order,* FCC 83–186, both adopted today, as well as the terms and conditions of all other previous orders and authorizations.

8. IT IS FURTHER ORDERED that, unless extended by the Commission for good cause shown, this authorization shall become null and void in the event the space station is not constructed by January 31, 1984, or is not launched and successfully placed into operation by July 31, 1984, in accordance with the technical parameters and terms and conditions of this authorization.

9. IT IS FURTHER ORDERED that Hughes Communications, Inc. IS AUTHORIZED to sell up to 24 transponders on its GALAXY

[6] We believe that this decision, along with our decision in Domestic Fixed Satellite Services, 90 FCC 2d 1 (1982), *recon. denied,* and the Memorandum Opinion and Order, FCC 83–183, adopted today, are fully dispositive of any arguments raised with respect to the processing of these applications. This also includes issues raised concerning the application of our *1980 Processing Order,* 77 FCC 2d 856 (1980), and any potential hearing rights that might be granted under the *Ashbacker Doctrine. See* Ashbacker Radio Corporation v. FCC, 326 FCC 2d 327 (1945). Moreover, our *1983 Orbit Assignment Order,* FCC 83–196, resolves all issues raised by the parties relating to particular orbit assignments.

III satellite as proposed in its application and in accordance with the Commission's policies articulated in *Domestic Fixed Satellite Transponder Sales*, 90 FCC 2d 1238 (1982).

10. IT IS FURTHER ORDERED that the temporary assignment of any orbital location to Hughes Communications, Inc. is subject to change by summary order of the Commission on 30 days notice and does not confer any permanent right to the use of the orbitor spectrum. Such a change may be ordered *inter alia* to implement uniform 2 ° separations, to require colocation of in-orbit satellites in the event of excess spare capacity, or to implement any of the objectives or policies set forth in today's *Report and Order*, FCC 83–184, in CC Docket No. 81–704, or *1983 Orbit Assignment Order*, FCC 83–186. Neither this authorization, nor any right granted by this authorization, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, or by transfer of control of any corporation holding this authorization, to any person except upon application to the Commission and upon a finding by the Commission that the public interest, convenience, and necessity will be served thereby.

11. IT IS FURTHER ORDERED that the Petitions to Deny filed by Hughes Television Network, Satellite Syndicated Systems, Wold Communications, Inc. and Western Union Telegraph Company ARE DENIED.

12. Hughes Communications, Inc. is afforded thirty days from the date of release of our *Report and Order* to decline this authorization as conditioned. Failure to respond within that period will constitute formal acceptance of the authorizations as conditioned.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Employment, Equal Employment Opportunity Rule, Compliance Ordered
Petition to Deny

Petition to deny certain license renewal applications dismissed and/or denied. Where minorities or women are not present on a licensee's staff in a percentage bearing a reasonable relationship to their presence in the local labor force and the licensee has not made a reasonable effort to recruit and hire minorities and women, appropriate remedial sanctions will be ordered.
–Louisianna/Mississippi B/c Stations

FCC 83–228

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of Certain Broadcast Stations Serving Communities in the States of Louisiana and Mississippi

MEMORANDUM OPINION ORDER

(Adopted: May 12, 1983 Released: May 24, 1983)

BY THE COMMISSION: COMMISSIONER RIVERA DISSENTING IN PART AND ISSUING A STATEMENT.

1. The Commission has before it for consideration: (i) a "Petition to Deny and to Intervene" filed May 3, 1982, by the National Black Media Coalition and others (hereinafter "Petitioners") against the license renewal applications of 19 broadcast stations serving various communities in the States of Louisiana and Mississippi;[1] (ii) a second

[1] The challenged license renewal applications include: in Alexandria, KDBS (File No. BR-820125YF) and KRRV (FM) (File No. BRH-820125YG), licensed to KDBS, Inc.,; in Baton Rouge, WLCS (File No. BR-8230125YA) and WQXY-FM (File No. BRH-820125XZ), licensed to Air Waves, Inc., and WYNK (File No. BR-820202VJ) and WYNK-FM (File No. BRH-820202VI), licensed to Miss-Lou Broadcasting Corp; in Golden Meadow, KLEB (File No. BR-820201E8) and KZZQ-FM (File Nos. BRH-790201XN, as supplemented, BRH-820201E9), licensed to KLEB Broadcasting, Inc.; in Houma, KJIN (File No. BR-820201J2) and KCIL (FM) (File No. BRH-820201I9), licensed to Southern Louisiana Broadcasters, Inc.; in Lake Charles, KLOU (File No. BR-82021I2), licensed to Dixie Broadcasters, Inc.; in New Orleans, WYES-TV (File No. BRET-820201UN), licensed to the Greater New Orleans Educational Television Foundation, and WSMB (File No. BR-82021L5), licensed to Norad, Inc; and in Shreveport, KEEL (File No. BR-820201ZW) and KMBQ (FM) (File No. BRH-820201ZU), licensed to Multimedia Radio, Inc. In addition, NBMC challenged the license renewal applications of Stations WSLI and WXLY (FM) (File No. BRH-820201UP), Jackson, licensed to Capitol Broadcasting Company,

petition to deny, filed May 3, 1982, by Robert M. Walker, the Mississippi NAACP, and the Black Mississippi Council on Higher Education against the license renewal applications of WSLI and WXLY (FM), Jackson, Mississippi, and WROA and WZKX (FM), Gulfport, Mississippi;[2] (iii) opposition pleadings from all stations;[3] (iv) a reply by petitioners; (v) a motion to intervene and an opposition filed by the American Legal Foundation (ALF); and (vi) various related pleadings.

2. *Procedural Matters.* Both petitioners and the licensees present arguments with respect to the standing of the petitioners. Review of the affidavits[4] submitted by the petitioners reveals that none of them is a listener or a resident of the service area of Stations KDBS/KRRV (FM), KLEB/KZZQ-FM, KJIN/KCIL (FM), KLOU, KEEL/KMBQ (FM), or WROA/WZKX (FM). Accordingly, the renewal challenge against those stations will be treated as an informal objection.[5] Nevertheless, these stations' applications are before us because of their employment profiles. Section 0.283(b)(1) of the Commission's Rules.

3. With regard to the remaining stations, we have affidavits

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and WROA (File No. BR-820202VB) and WZKX (FM) (File No. BRH-820202VD), Gulfport, Mississippi, licensed to Gulf Coast Broadcasting Company. Finally, we note that NBMC's petition was dismissed pursuant to its own request with respect to the license renewal applications of Stations WSHO, WBYU (FM), and WGNO-TV, all in New Orleans, and Station KLRA, Little Rock, Arkansas.

[2] These stations are included in the NBMC petition and the issues raised are identical to those raised therein. Consequently, we have opted to address both petitions in this Order.

[3] Although no opposition was filed originally by the licensee of KDBS/KRRV(FM), it subsequently stated that the opposition filed by the American Legal Foundation was intended to serve as its opposition.

[4] Petitioner NBMC supported its assertions initially only by the affidavit of Pluria Marshall, a resident of Washington, D.C., while petitioner NAACP submitted the affidavit of Mr. Walker, who stated he was a listener of WSLI and WXLY(FM). On May 13, 1982, NBMC submitted the affidavit of G. Washington Eames, the President of the NAACP in Baton Rouge, and it explained that the filing was late because of delays in mail delivery. In addition, it requested that the Shreveport and the Alexandria branches of the NAACP be added as petitioners, but it did not file any additional affidavits. Finally, on July 12, 1982, NBMC submitted the affidavit of Shirley Porter, President of the New Orleans NAACP, and it explained that the untimely filing resulted from the unexpected withdrawal of the local NBMC member.

[5] Similarly, the ALF opposition is not supported by the affidavit of anyone who has demonstrated party in interest status. Accordingly, ALF has not established that it has standing. In addition, we note that both NBMC and ALF seek "to intervene." As the Commission has pointed out, our procedures do not envision consideration of such a petition unless and until an application has been designated for hearing. Section 1.223 of the Commission's Rules; *District of Columbia Renewals*, 77 FCC 2d 899, 900, *recon. den.*, 82 FCC 2d 276 (1980). Since none of the challenged applications is being set for hearing by this Order, there is no basis for allowing any petitioner or ALF to intervene at this stage of the proceedings. Accordingly, ALF's motion to intervene is denied and its opposition dismissed except with respect to Stations KDBS and KRRV(FM), for which ALF is counsel.

from local residents. Although two of these affidavits were not timely, the circumstances surrounding their filing indicate that the petitioners did not intend to abuse the processes of the Commission. Accordingly, we shall accept the late-filed affidavits and consider the NBMC/Baton Rouge NAACP/New Orleans NAACP pleading as a petition to deny the applications of WLCS/WQXY-FM, WYNK/WYNK-FM, WYES-TV and WSMB, and we shall consider the Walker pleading as a petition to deny the renewal applications of Stations WSLI/WXLY(FM).

4. *Preliminary Matters.* All petitioners allege that the employment practices of the challenged stations evidence a failure to comply with the Commission's EEO rule (Section 73.2080 of the Commission's Rules) and policies with respect to Blacks, and they refer to the licensees' Annual Employment Reports and EEO programs to support their arguments. In addition, NBMC alleges that the programming practices of KLEB and KZZQ-FM discriminate against local Black listeners. Petitioners therefore request that the Commission investigate the EEO practices of the challenged stations as well as the programming practices of KLEB and KZZQ-FM; designate the challenged applications for hearing; permit them to intervene; (*see* n.5, *supra*) and deny each of the applications.

5. Section 73.2080 of the Commission's Rules requires broadcast licensees to refrain from employment discrimination and to establish an affirmative action program which results in positive and continuing efforts to recruit, employ and promote qualified women and minorities. In evaluating a licensee's EEO performance, the Commission first compares a licensee's employment profile to the available labor force. When that comparison reveals that a reasonable relationship exists between the presence of minorities and women on the licensee's staff and their availability in the local labor force, our practice is to review the licensee's EEO program to determine whether it is complete. However, if the statistical comparison indicates that the licensee's employment of minorities or women does not bear a reasonable relationship to their presence in the available labor force, or if the employment practices of a broadcast licensee are challenged, we thoroughly review the licensee's EEO program in conjunction with the licensee's employment reports.[6] When the information available is sufficient to permit a determina-

[6] By Public Notice No. 14932, dated March 10, 1977, the Commission established processing guidelines for routine evaluation of license renewal applications whereby an in-depth review would be conducted of the EEO program of any station with more than 10 full-time employees whose minority or female employment did not reflect at least 50% of their percentage in the available labor force overall and 25% in the upper-four job categories. By Public Notice, FCC 80-61, dated February 13, 1980, this processing criteria was extended to stations with 5 to 10 full-time employees. Further, the Commission revised the processing criteria for the upper-four job categories to 50% for stations with 11 or more full-time employees.

tion that the licensee is adhering to our EEO rule and policies, we deny the petition and grant the pending application if otherwise appropriate. However, when the information suggests that minorities or females are not being afforded equal opportunities in employment and that the cause therefor is a faulty EEO program or an insufficient effort to implement an EEO program, appropriate remedial sanctions are ordered. *Provident Broadcasting Company*, FCC 82-473, 52 RR 2d 766 (1982). Further, when the cause cannot be determined, the Commission will conduct an inquiry or an investigation. *Mississippi Authority for Educational Television*, 71 FCC 2d 1296, 1316 (1979). Finally, of course, when our analysis indicates that a substantial and material question of fact exists, we will designate the application for an evidentiary hearing. 47 U.S.C. § 309; *Federal Broadcasting System, Inc.*, 59 FCC 2d 356, 363-66 (1976); *Rust Communications Group*, 53 FCC 2d 355 (1975). Thus, as the foregoing demonstrates and as we have repeatedly emphasized, the determinative factors in our evaluation of a licensee's employment practices are not the licensee's employment statistics but the thoroughness of the licensee's EEO program and its good faith efforts to make that program work. *Chicago Metropolitan Broadcast Stations*, 89 FCC 2d 1031 (1982).

6. Applying the foregoing principles, we have evaluated the stations' submissions in light of the petitioners' arguments and the local labor force data for women and minorities, and we find that the following stations' EEO performances warrant no further inquiry or administrative sanction:[7]

(a) WLCS/WQXY-FM, Baton Rouge.[8]

Comparing the most recent license term employment report of the stations–27 full-time employees, including four (14.8%) minorities, and 25 employees in upper-four jobs, including three (12.0%) minorities–with the Baton Rouge SMSA labor force figures for minorities (25.2%)–we find that the stations' overall full-time employment of minorities is within our processing guidelines while their employment of minorities in the upper-four jobs is slightly outside of the guidelines. However, as petitioners have noted, the stations' three license term Annual Employment Reports (*see* Appendix) show that minority employment both overall and in the upper-four job categories was consistently less than 50% of labor force parity.[9] Nonetheless, it appears that the stations had a positive

[7] The licensees' employment profiles and practices concerning women were not put in issue by any of the petitioners. Nevertheless, we have examined them and we find that they are in compliance with our EEO policies, except as noted herein.

[8] Labor force figures referred to herein were obtained from the Louisiana Department of Labor's "Manpower Information for Affirmative Action Programs" May 1981 edition. According to the Louisiana Department of Labor as well as available census data, Blacks are the only statistically significant minority group in all the Louisiana markets examined, except in the New Orleans SMSA, and in southern Lafourche Parish.

[9] However, the employment reports also show that in 1980, the stations employed six professionals part-time, including one Black, while in 1981 and 1982, they

continuing EEO program. In this regard, we note that the stations monitor the statistical results of their EEO program every six months; that 49 referrals were obtained from a variety of sources during 1981; and that two of the nine hires during 1981 were minorities. Although petitioners observe and the licensee admits that the stations have not utilized the local Black newspaper as a source of referrals, the stations have participated in many minority outreach and training programs resulting in the filling of some announcing positions with Blacks.

(b) WYES-TV, New Orleans.

The New Orleans SMSA labor force includes 27.2% minorities. The most recent license term employment report for the station dated March 29, 1982, reveals a staff of 61 full-time employees, including 14 (23.0%) minorities, and 52 persons in the upper-three job categories,[10] including eight (15.4%) minorities.[11] However, the station's three license term Annual Employment Reports show that the percentages of minority employment fluctuated from 17.6% overall and 7.5% for upper-three jobs in 1980 to 18.7% overall and 5.9% for upper-three jobs in 1981 to 17.5% overall and 8.7% for upper-three jobs in 1982.[12] Thus, for the majority of the license term under review, the station's level of minority employment in the upper-three job categories was below the Commission's processing guidelines. Review of the station's EEO program shows that contacts with both minority and female organizations, the state employment service and three local universities, as well as advertisements in the local paper, resulted in more than 1,200 referrals in 1981. The station also provided on-the-job training to a Black for the position of master control engineer, and it conducted intern programs with four local universities. Consistent with these efforts, the station's 25 hires in 1981 included seven minorities, while one of the two promotions which occurred during 1981 went to a Black. Moreover, upon its own examination of its employment of minorities, WYES subsequently collaborated with the local cable franchisee for training minorities in its upper-level positions. Finally, we note that the licensee hired a Black as a transmitter engineer on March 31, 1982.

(c) KJIN/KCIL(FM), Houma.

Statistics for Terrebonne Parish, of which Houma is the principal city, show that the labor force includes 16.1% minorities. The licensee's 1982 Annual Employment Report reveals that the stations employed 16 persons overall on a full-time basis, including two (12.5%) minorities, and 14 persons in the upper-four job categories, including one (7.1%) minority, while the licensee's 1981 and 1980 Annual Employment Reports reveal that the licensee employeed 16 persons in 1981, including one minority in the office and clerical category, and 19 persons in 1980, including two minorities, both in the upper-four job categories. The stations' EEO program shows that applicant referrals were received from various sources and that on-the-job training is provided for all employees. In addition, the licensee states that although there are no Black organizations, colleges, or press

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employed ten and eight professionals part-time respectively, two of whom were Black. According to the licensee, one of the Black employees listed as part-time occasionally works full-time and has declined offers of full-time status.

[10] As a noncommercial station, WYES-TV employed no sales personnel.

[11] Although the licensee lists a ninth minority (a Black female) as an upper-three (professional) employee, her title, "Executive Secretary," indicates that she is more properly classified in the Office and Clerical category. Accordingly, we have not viewed her as a professional in our evaluation of the station's employment practices.

[12] The pay period represented in the licensee's 1982 Annual Employment Report is January 3, 1982, while the pay period represented in the licensee's March 29, 1982 amendment is March 15, 1982.

within the stations' service/recruitment area, it did ask individual leaders of the local Black community to refer potential job applicants, and it also states that it had a cooperative training program with a local high school. As a result of these efforts, the stations hired five persons during 1981, including two minorities, while during the license term, it hired four Blacks, including two for full-time work.

(d) KEEL/KMBQ(FM), Shreveport.

Figures for the Shreveport SMSA indicate that the labor force includes 29.1% minorities. The stations' profile, gleaned from its most recent license term report, reveals a full-time staff of 31 employees, seven (22.6%) of whom are minorities, and 28 employees in the upper-four job catagories, five (17.9%) of whom are minorities. Review of the licensee's EEO program indicates that the stations obtained referrals from a number of sources; that on-the-job training was provided to four Blacks employed in upper-four positions; and that a minority advanced from receptionist to traffic manager to salesperson. Further, data supplied by the licensee show that from June 1, 1979 to January 1, 1982, the stations hired 33 persons for full-time work, including twelve minorities, and that two minorities were hired between January 1, 1982 and May 10, 1982, both for upper-four positions. Thus, although the license term employment reports reveal that the percentage of Black employment in the upper-four job categories did not come within the Commission's processing guidelines until subsequent to the filing of the renewal application, it appears that the stations' present profile is a direct result of the stations' EEO program.

(e) WROA/WZKX(FM), Gulfport.

Figures for the Biloxi-Gulfport SMSA reveal that the labor force includes 17.2% minorities.[13] The stations' three license term employment reports show that full-time employment fluctuated from 20 in 1980, to 11 in 1981 and 15 in 1982, while the number of minority employees fluctuated from three (15.0%) in 1980 to none in 1981 and one (6.7%) in 1982. Similar variations occurred in the number of employees in the upper-four job categories, while the number of minorities declined from two (11.8%) in 1980 to none in 1981 and 1982. *See* Appendix. According to the stations' EEO program, referrals were sought from the Mississippi State Employment Office, Jeff Davis Junior College, Phillips Business College, and Keesler Air Force Base, and that "several," including a Black female, were obtained. Further, the stations' EEO program states that of four persons hired in 1981, one was a minority, but that there was no change in the stations' employment profile since the filing of their most recent report. However, that report (1981) did not list any full-time employee as being a minority.

Both petitioners argue that the stations' 1982 profile is the result of an "absolutely neutral" EEO program, and they cite as support the absence of Black organizations, schools, or newspapers, as well as the absence of any training or internship program. However, neither NBMC nor Mr. Walker refers to any specific recruitment source which the licensee could have used but did not use. Further, petitioner NBMC notes that there is an inconsistency between the stations' EEO program hiring data (one minority), its employment profile according to its EEO program (no change), and its 1981 Annual Employment Report (no minorities). According to NBMC, the inconsistency constitutes a

[13] Mississippi figures were obtained from the "Labor Market Information for Affirmative Action Programs" March 1981 edition, which was prepared by the Mississippi Employment Security Commission. As with the majority of the Louisiana markets examined, Blacks are the only statistically significant minority in both Gulfport and Jackson.

misrepresentation and is the result of the stations having copied their 1979 EEO program.

In its opposition, the licensee supplied information concerning all personnel actions involving minority employees during the 1979–1982 license term. A Black woman, with no previous experience in radio, was hired in the summer 1979 and trained as FM traffic manager. She remained in that position until December 1980 when she moved with her husband to St. Louis, Missouri. With respect to the other two minorities listed on the stations' 1980 Annual Employment Report, one, an announcer, was promoted in July 1980 to the licensee's co-owned station in Dublin, Georgia (WLMT), while the other resigned in August 1980 after having been employed in excess of nine years in both the news and sales departments. During 1981, the stations' six hires included three minorities. The first hired in April as an announcer, left in June for another job. The second, hired in June (also as an announcer), left in October for work in Birmingham, Alabama, while the third was hired and trained as FM traffic manager. Finally, the licensee conceded that some of the data in the stations' 1982 EEO program was erroneous; however, it explained that the licensee's Annual Employment Report for the pay period ending January 15, 1982 had been prepared and it was this report which it meant to reference in responding to the "Current Employment Survey" position of the EEO program.[14] The 1982 Annual Employment Report did show an increase of 4 employees, including 1 minority. In addition, the licensee failed to include in its statement of 1981 hires two minority employees who were hired in 1981 but who had resigned prior to preparation of the stations' renewal applications.

Given the foregoing we believe that the information submitted by the licensee not only dispels any inference of discrimination or misrepresentation but also indicates that the stations' EEO program is sufficiently affirmative. However, we admonish the licensee for the factual errors contained in its EEO program, and we caution it to include, in the future, all of the information specified in the renewal application and accompanying instructions irrespective of the EEO program format used.

7. The following stations either have only recently begun to implement their EEO programs or have not pursued affirmative action throughout the license term. Accordingly, we believe that further Commission monitoring is necessary to ensure full compliance with our EEO policies, and we have imposed appropriate remedial sanctions. An analysis of each station's EEO performance follows:

(a) KLOU, Lake Charles.

The Lake Charles SMSA labor force includes 18.6% minorities. The employment report filed with the licensee's renewal application shows that it employed 13 persons overall full-time, including two (15.4%) minorities, and ten persons in the upper-four job categories, including one (10%) minority. Detailed reports[15] filed by the licensee, viewed in conjunction with the licensee's EEO program, reveal that from October 1, 1980 to January 1, 1982, referrals were sought from minority organizations, employment agencies, and colleges, and that various

[14] At the time of the filing of the renewal applications (February 2), the Annual Employment Report had not been filed with the Commission.

[15] By letter dated October 25, 1979, the Commission required KLOU to submit data regarding job hires, details concerning recruiting efforts, and a list of all employees as of October 1, 1980, and January 1, 1982.

print media were used to advertise job openings. Following these efforts, the licensee interviewed 134 persons, including 47 Blacks, and hired 34 persons, including nine Blacks, three of whom as announcers. The licensee also offered on-the-job training, with the result that one of the licensee's Black announcer/trainees was promoted to a full-time position in March 1982. Although NBMC notes that this employee is the lowest paid professional on the station's staff and it argues that he is being discriminated against, it submits no evidence rebutting the licensee's explanation that the level of compensation reflected his initial status as a part-time announcer. Finally, as of June 25, 1982, the licensee's employment profile reflected twelve persons employed full-time, including three (25%) minorities, and ten persons in the upper-four job categories, including two (20%) minorities. However, because this increase in upper-level minority employment occurred only recently and is not reflected in earlier reports filed by the station, reporting conditions will be continued in order to assure ourselves that the station's efforts to seek out and employ minorities will continue.

(b) WSMB, New Orleans.

The licensee's 1982 Annual Employment Report reveals a full-time staff of 19 persons, including two (10.5%) minorities, and 17 persons in the upper-four job categories, including one (5.9%) minority. These figures are not within our processing guidelines in view of the minority presence in the New Orleans SMSA labor force (27.2%). Similarly, the station's three other license term employment reports reveal only three minority employees employed full-time and only one minority in an upper-level job. Petitioners charge that the licensee's failure to increase the number of minority employees on its staff is the direct result of an EEO program which "is at times insufficient and at times hostile to minority employment." Specifically, petitioners claim that the licensee's failure to include a pledge of nondiscrimination in its EEO program, its omission of the number of referrals received from recruitment sources, and its decision not to hire two Black men on the ground that they wanted "too much money" evidence a state of mind "bent on avoiding the rules."

Review of the licensee's EEO program shows that the station's professed policy is to provide equal opportunities in employment to all qualified individuals without regard to their race or color, and this pledge is printed conspicuously on the station's job application form. Concerning recruitment, the licensee reports that there have been only a small number of hiring opportunities and that because of financial difficulties, positions have not been filled. In this regard, we note that the number of total employees decreased from 31 in 1980 to 19 in 1982. When positions were filled, the station's EEO program lists the local NAACP, the local Urban League, a minority women's organization, a state employment service, and several local universities as recruitment sources, but the number of referrals from each source is not indicated. Nonetheless, some minorities were apparently recruited since one of five hires during 1981 was a minority while two Blacks were interviewed for an announcer's position.[16] Further, although no formal training program exists, a Black hired as a receptionist was promoted to the position of traffic manager while another Black was promoted to assistant office manager and then to office manager. Although we do not believe that the station is discriminating against minorities, we are concerned that the station's inability to increase the percentage of minorities on its staff may be due, in part, to an ineffective EEO program. Accordingly, reporting conditions will be imposed. In addition, we admonish the licensee to provide, in the future, all the information called for in the instructions to the station's renewal application.

[16] The licensee states that they were not hired because the station could not meet their salary requirements.

(c) WYNK/WYNK-FM, Baton Rouge.[17]

Comparison of the stations' staff with the Baton Rouge SMSA labor force—35.9% women and 25.2% minorities—discloses that the stations' employment of women (in the upper-four job categories) and minorities is slightly outside the Commission's processing guidelines. Specifically, the 1982 Annual Employment Report shows 26 full-time employees, including six (23.1%) women and three (11.5%) minorities, and 22 persons in upper-four jobs, including two (9.1%) women and two (9.1%) minorities. Review of the stations' 1981 and 1980 employment reports reflects similar or lower levels of female and minority employment. *See* Appendix. Petitioners contend that the stations' license term employment profiles are the result of an "absolutely neutral" EEO program since the licensee did not list any Black organization, newspaper or college as a recruitment source. In addition, they point to the licensee's assertion in its EEO program that few Black men want to work for a country and western station as evidence that the licensee does not understand or intend to comply with our EEO policies.

Review of the written EEO program indicates that the licensee employed several methods of attracting job applicants. During 1981, however, the stations received only six referrals as well as twelve "off-the street" applications and hired 13 persons primarily in the lower job categories, including four women, but only one minority.[18] On the other hand, the licensee's on-the-job training resulted in one Black woman and two white women being promoted from secretary to assistant bookkeeper, traffic manager, and account executive respectively. In view of the licensee's apparent willingness to hire, train, and promote women and minorities, we do not believe that the stations' levels of female and minority employment are the result of intentional discrimination. However, as petitioners have noted, the stations have not regularly sought referrals from likely sources of minority applicants, nor have they utilized the local minority paper for job advertisements. Thus, although the relative stability of the stations' upper-four job categories may explain the continued small percentages of minorities and females therein, we find that the licensee's apparent reliance on "off-the-street" applications is inconsistent with an effective affirmative action program. In addition, we wish to point out that a station's format cannot, in most instances, justify a questionable EEO performance. Accordingly, we shall require that the licensee submit an amended EEO program which sets forth its proposals for seeking out minority and female applicants, and we shall impose reporting conditions to monitor the licensee's efforts.

(d) KDBS/KRRV(FM), Alexandria.[19]

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[17] Because the stations' employment of women in the upper-four job categories is outside our processing criteria, the licensee's employment practices with respect to women are also being discussed herein.

[18] The licensee's EEO program shows twelve hires but no minorities. However, in its opposition, the licensee states that it did hire one minority during 1981 but that she left after having received two weeks of computer training to work at another radio station. In addition, the licensee states that in previous years, it regularly contacted Southern University, Louisiana State University, and the former president of the local NAACP, but that no referrals resulted.

[19] We note, initially, that the licensee argues that we should not consider its employment practices absent a showing that its programming was discriminatory. However, it is precisely because we do not wish to involve ourselves on a routine basis with questions concerning a licensee's programming judgments that we have opted to address discrimination against women and minorities in ways which are less likely to implicate the First Amendment. Indeed, the judiciary has observed that our consideration of broadcast licensees' employment practices enables us to fulfill our public interest responsibilities. *See NAACP* v. *FPC*, 425

The Alexandria SMSA labor force includes 25% minorities. The licensee's most recent profile, taken from its 1982 Annual Employment Report, shows that the licensee employed on a full-time basis 17 persons overall and 15 persons in the upper-four job categories, none of whom was a minority. It also shows two Black part-time laborers. Similarly, review of the other employment reports filed during the 1979–1982 license term reveals no full-time minority employees. *See* Appendix. According to the licensee, the stations employed only one minority on a full-time basis during the license term but that he left in order to take a job with a local all-Black station, and it cites the presence of that station to explain the absence of minority employees from its stations. Review of the stations' EEO program indicates that the licensee contacted various conventional applicant referral sources and that it placed advertisements in both Alexandria's daily newspaper and its Black weekly newspaper. However, the licensee then notes that during the period February 15, 1981 to January 15, 1982, it hired 20 persons, none of whom was a minority. Nevertheless, it states that a sufficient number of qualified minorities are applying for available positions.

Although the licensee's EEO program with respect to women appears exemplary, we are concerned that the licensee apparently believes that the mere presence of a local station with a Black format absolves it of any further responsibility to seek out minority job applicants. Nonetheless, we do not believe that a hearing is warranted at this time, in view of the absence of any allegation or proof of intentional discrimination. At the same time, however, we believe that grant of a full seven year term is not appropriate and that imposition of the full range of remedial sanctions is necessary to ensure that the licensee will be responsive to the affirmative action component of our rules. Accordingly, we shall defer grant of the licensee's application pending receipt of a revised EEO program which lists specific sources and methods it will utilize to seek out minority job applicants for each opening at the stations in accordance with our policy concerning affirmative action. In addition, the licensee's revised EEO program is to set forth goals and timetables for minority hiring for the next two years. These goals are to be numerical objectives fixed realistically, stating the number of job opportunities anticipated between now and April 1, 1985. The projected hiring goals should be the maximum that can be achieved by taking positive steps to attract as many minority applicants for each opening as possible. Finally, upon our approval of the goals submitted by the licensee, we shall grant renewal for a short-term to August 1, 1985, and shall require progress reports so that we can review fully at an early date this licensee's EEO performance.

(e) KLEB/KZZQ-FM, Golden Meadow.

By way of background, we note that the Commission previously imposed reporting conditions on the licensee as a result of a deficient EEO program during the 1976–1979 license term. In so doing, the Commission observed that although the labor force of the licensee's parish of license (Lafourche) contained 10.7% minorities, the stations' profile revealed no full-time minority employees; their EEO program indicated that only one minority organization in an adjacent parish had been contacted during the twelve month period preceding the filing of the renewal application; and their 16 most recent job hires did not include a minority. By Direction letter, dated October 25, 1979.

Minorities continue to comprise 10.7% of the Lafourche Parish labor force. The 1982 Annual Employment Report shows 14 full-time employees including ten in

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U.S. 662, 670 n.7 (1976); *Bilingual Bicultural Coalition* v. *F.C.C.*, 193 U.S. App. D.C. 236, 595 F.2d 621, 628 (1978). Accordingly, we believe that our present practices regarding review of our licensees' employment practices are proper and fully justified.

the upper-four job categories, and eleven part-time employees, but no minorities. The stations' other license term Annual Employment Reports also show an absence of minority full-time employees, while the detailed periodic "EEO Progress Reports" show three of 66 new hires were minorities. Specifically, the initial report discloses that between October 25, 1979 and October 1, 1980, none of the persons hired for the ten full-time and 17 part-time job openings was a minority. The second report, submitted on May 17, 1982, although it was due on or before February 1, 1982, shows 21 full-time and 18 part-time new hires. Of these, three were minorities, namely a Black woman hired on October 15, 1980 as a sales person and rehired as a part-time receptionist on January 9, 1981, and a second Black hired as a part-time "news stringer" on October 16, 1980. With regard to recruitment, the licensee's first report indicates that the stations contacted minority organizations for 16 of the 27 positions filled, while in the second report the licensee documents efforts to fill three positions and claims the same efforts were utilized to fill 19 other jobs. In this regard, copies of radio and newspaper advertisements and letters to various organizations were furnished. We note, however, that this procedure was not followed for 17 of the 39 positions described in the second report. The licensee explains that five were filled by former consultants or employees, two by spouses of station employees, five by local high school students, three by local French language announcers, one by a stockholder of the stations, and another by a "walk-in". However, the licensee also claims that it offered a full-time position to an American Indian, a Hispanic and its Black part-time receptionist, but that the offers were declined. Finally, the licensee argues that its actual recruitment area is only the southern portion of the parish,[20] and it contends that its EEO performance should be compared with the minority population of South Lafourche (6.7%). In this regard, the licensee notes that 47 of the 66 persons hired between October 25, 1979 and January 1, 1982, lived in South Lafourche at the time of their hiring, while only three resided in some other portion of the parish. Thus, the licensee contends that its minority hiring record is reasonable in view of the percentage of minorities residing in South Lafourche.

As a general rule, broadcast licensees not located within a Standard Metropolitan Statistical Area (SMSA) are to use labor force statistics of their county of license as an initial frame of reference to assess their EEO program. *Provident Broadcasting Company, supra.* Where, as in this case, such data is available, a party seeking to use alternative data must provide substantial justification for doing so. *Id.* Here, the licensee has alleged no specific facts, other than its location within the parish and the residence of 70% of its new hires. Because this hiring data appears to be a product of the licensee's faulty recruiting procedures,[21] we find that the licensee has not provided substantial justification for use of South Lafourche population figures and that continued use of Lafourche

[20] The licensee supplies a detailed map of the parish which reveals that Golden Meadow is located in the center of Ward 10, the largest and most southern of Lafourche Parish's 11 wards, and that the parish is approximately 75 miles in length while South Lafourche (Ward 10) is approximately 20 miles in length.

[21] In this regard, we find that one unspecific letter does not constitute a diligent continuing recruitment effort with regard to four or five positions filled during the following three to five months. Similarly, the licensee's rehiring of former employees and its hiring of station employee spouses or family members are practices unlikely to expand the pool of potential applicants. In any event, the figure proposed by the licensee (6.7%) is not so different from the labor force figure for the parish (10.7%) as to be significant since the addition of one full-time upper-four minority employee to the licensee's staff would bring the licensee within the Commission's processing guidelines.

Parish labor force data for the initial assessment of the stations' EEO performance is appropriate.

In view of the information before us, we do not believe that the licensee's minority employment profile is the result of intentional discrimination;[22] however, we are concerned that the licensee did not consistently utilize or periodically evaluate the effectiveness of its minority recruitment sources during the 1979–1982 license term. Accordingly, we believe it necessary to continue the reporting conditions and in order to review the progress at an early date we shall grant renewal for less than the full term.[23]

(f) WSLI/WXLY(FM), Jackson.[24]

The Jackson SMSA labor force includes 30.8% minorities. Review of the licensee's three Annual Employment Reports for the radio stations reveals an increase in overall full-time employment from 28 to 30 employees but a decline in the number of minorities from five (17.9%) to four (13.3%). For the upper-four job categories, the reports show an increase from 26 to 28, with three minority employees. Hence, the stations' minority profile is outside our processing criteria for 1982 and below the criteria for 1981 and 1980 for upper-four employment. Review of the licensee's EEO program indicates that the stations obtained referrals from the state employment commission (one referral), two private agencies (six referrals), and two local universities, one of which was Jackson State University (no referrals noted), for 32 total vacancies. In the area of training, the stations provided on-the-job training with the following results: a Black hired as a receptionist for the radio stations became traffic director; a Black, hired as a janitor, was assisted in obtaining an FCC engineering license and then promoted to radio, studio engineer; and a white female, hired as a copywriter trainee for the radio stations became an on-the-air newsperson and then transferred to television news. In addition, although disputed by petitioners, the licensee claims to have had an internship program with Jackson State and other local colleges and that it provided tuition assistance for any employee who desired to take job related courses at local colleges.[25] However, during 1981, the

[22] On March 4, 1983, the licensee informed us that it hired an American Indian as a sales trainee on November 1, 1982. Although we believe that this hiring supports our conclusion that the licensee did not discriminate against minorities, we are not persuaded to alter our determination that the stations' license term EEO efforts were deficient.

[23] We also note that NBMC argues that the licensee's programming is deficient because the stations allegedly did not broadcast "any material directed to Black audiences." Further, NBMC contends that since the stations are the only stations in southern Lafourche Parish, market failure exists with regard to the interests of Black listeners. However, NBMC's charges are not supported by any listeners of the stations, nor do they include any issue of importance to local Blacks which the licensee unreasonably ignored. Accordingly, we find that NBMC's charges warrant no further inquiry since they are not supported by specific allegations of fact which, if true, would establish that the licensee's overall programming could not reasonably have met the needs and interests of the people within its service area. *American Broadcasting Companies, Inc.*, 83 FCC 2d 302, 306 (1980).

[24] The licensee also operated WJTV(TV) Jackson during the 1979–1982 license term. That renewal application was not challenged and it was granted by delegated authority. Because all three stations were co-located, an identical EEO program was filed with each station's renewal application; however, it seems to relate primarily to the TV station.

[25] The other examples of training noted by the licensee appear to relate entirely to the operation of the licensee's television station, while in subsequent pleadings

licensee's 32 hires for all three stations included only three minorities, while of ten promotions given by the licensee, three went to Blacks.[26]

In our view, the information provided by the licensee in its program and pleadings indicates that during the majority of the license term, the affirmative action program of WSLI/WXLY(FM) was not aggressively implemented. In this regard, we note the following: the licensee has failed to provide any specific facts supporting its contentions regarding the effect of WXLY(FM)'s country format on its EEO efforts to attract Blacks, no specific information with respect to WSLI, and only vague arguments concerning the preferences of its Black interns for television work. When viewed in conjunction with the Annual Employment Reports and hiring data, the information suggests that the licensee's "contacts" resulted in few, if any, minority referrals for openings at the radio stations. Accordingly, although we believe that the licensee's overall training efforts and record of promotions of minorities warrant a finding of nondiscrimination, we also believe it necessary to monitor the stations' minority recruitment efforts, and we shall therefore impose reporting conditions.[27]

8. Accordingly, IT IS ORDERED, That the petitions to deny filed by the National Black Media Coalition, the Mississippi NAACP, and others ARE DENIED AND/OR DISMISSED; and when considered as an informal objection ARE DENIED.

9. IT IS FURTHER ORDERED, That the renewal applications for Stations WLCS, WQXY-FM, WYES-TV(ed), KJIN, KCIL(FM), KEEL, KMBQ(FM), WROA and WZKX(FM), ARE GRANTED.

10. IT IS FURTHER ORDERED, That the license renewal applications for Stations WYNK and WYNK-FM ARE GRANTED, subject to EEO conditions specified herein. In this regard, the licensee of WYNK/WYNK-FM is directed to file an amended EEO program within 30 days of the release of this Order in accordance with paragraph 7 of this Order, as well as comply with reporting conditions set forth herein.

11. IT IS FURTHER ORDERED, That the license renewal applications for Stations KDBS and KRRV(FM) ARE DEFERRED pending receipt, within 30 days of the release of this Order, of an amended EEO program which includes prospective hiring goals, along with a detailed statement explaining why the goals are

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the licensee says that information regarding its internship program at the radio stations was omitted because of the manager's death in mid-1981. However, the licensee also states that the majority of its interns preferred television work and that the country format of WXLY(FM) made it difficult to attract "qualified" Black announcers.

[26] The licensee also reported that during the license term five persons filed complaints alleging discrimination in employment. Of those complaints, two apparently are unresolved and are the subject of pending civil litigation, while the others were settled or resolved in favor of the licensee.

[27] We note that applications to assign the stations' licenses were filed subsequent to the filing of the petition to deny (File Nos. BAL-830228ET and BALH-830228HN). Given this situation we intend that the conditions imposed apply to the assignee should the sales be consummated. However, if the initial report submitted subsequent to such a consummation reveals that the stations have established a continuing, positive affirmative action program, the reporting conditions can be terminated.

reasonable, as well as a timetable to achieve them. Upon receipt of acceptable employment goals, the license renewal applications shall be granted for a short-term, ending August 1, 1985.

12. IT IS FURTHER ORDERED, That the license renewal applications for Stations KLEB and KZZQ-FM ARE GRANTED FOR A SHORT-TERM ending August 1, 1985, subject to reporting conditions specified herein.

13. IT IS FURTHER ORDERED, That the license renewal applications for Stations KLOU, WSMB, WSLI and WXLY(FM) ARE GRANTED, subject to reporting conditions specified herein.

14. IT IS FURTHER ORDERED, That the licensees of Stations KLOU, WSMB, WYNK/WYNK-FM, KLEB/KZZQ-FM, KDBS/KRRV(FM), and WSLI/WXLY(FM) are directed to submit the following information on an annual basis commencing on June 1, 1983 and continuing for two years thereafter with the final report being filed on June 1, 1985:[28]

(a) a list of all persons hired during the preceding year indicating their referral or recruitment source, job title, part-time or full-time status, date of hire, sex and race or national origin;

(b) a list of employees as of the most recent payroll period prior to each filing date, by job title with part-time or full-time status indicated (ranked from the highest paid to the lowest paid), date of hire, sex and race or national origin;

(c) a list of all job vacancies during the year by job title with full or part-time status indicated, showing the race or national origin, sex and referral source for the applicants for each job; and

(d) a narrative statement detailing the stations' efforts to recruit for each position filled during the specified periods, including the identification of sources used for the purpose of increasing the stations' pool of minority applicants.[29]

15. IT IS FURTHER ORDERED, That the Mass Media Bureau send by Certified Mail-Return Receipt Requested a copy of this Memorandum Opinion and Order to each of the parties to this proceeding.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

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[28] Upon submission of the third report for Stations KLOU, WYNK/WYNK-FM and WSLI/WXLY(FM), the Commission shall review the licensees' EEO performance, and if we determine that the licensee has developed an effective EEO program, no further reports will be required. The 1985 progress for KLEB and KZZQ-FM should be filed with its application for renewal of license on or before April 1, 1985.

[29] The affected licensees may contact Mr. Glenn Wolfe (202-632-7069) of the EEO Branch of the Mass Media Bureau's Enforcement Division for information on the amended EEO programs, the formulation of hiring goals, and employment reports.

APPENDIX

Station	Overall Total	Overall Women	Overall Minorities	Top Four Categories Total	Top Four Categories Women	Top Four Categories Minorities
WLCS/WQXY-FM						
1982	26	10 (38.5)	3 (11.5)	24	8 (33.3)	2 (8.3)
1981	25	10 (40.0)	3 (12.0)	22	7 (31.8)	2 (9.1)
1980	26	10 (38.5)	3 (11.5)	23	7 (30.4)	2 (8.7)
50% and 50% of SMSA parity		18.0%	12.6%		18.0%	12.0%
WYES-TV[1]						
1982	61	24 (39.3)	14 (23.0)	52	15 (28.8)	8 (15.4)[2]
Ren. App.	57	23 (40.0)	10 (17.5)	46	13 (28.3)	4 (8.7)
1981	64	25 (39.1)	9 (14.1)	51	14 (27.5)	3 (5.9)
1980	68	30 (44.1)	12 (17.6)	53	17 (32.1)	4 (7.5)
50% and 50% of SMSA parity		18.7%	13.6%		18.7%	13.6%
KJIN/KCIL(FM)						
1982	16	5 (31.3)	2 (12.5)	14	2 (21.4)	1 (7.1)
1981	16	6 (37.5)	1 (6.3)	12	2 (16.7)	0 (0)
1980	19	8 (42.1)	2 (10.5)	17	6 (35.3)	2 (11.8)
50% and 50% of parish parity		13.5%	8.1%		13.5%	8.1%
KEEL/KMBQ(FM)						
May 1982	31	12 (38.7)	7 (22.6)	28	9 (32.1)	5 (17.9)
April 1982	32	12 (37.5)	6 (18.8)	29	10 (34.5)	4 (13.8)
1982	32	13 (40.6)	5 (15.6)	29	10 (34.5)	3 (10.3)
Ren. App.	31	13 (41.9)	5 (16.1)	28	10 (35.7)	3 (10.7)
1981	32	13 (40.6)	5 (15.6)	28	9 (32.1)	2 (7.1)
1980	35	12 (34.3)	5 (14.1)	30	8 (26.7)	1 (3.3)
50% and 50% of SMSA parity		20.3%	14.6%		20.3%	14.6%
WROA/WZKX						
1982	15	5 (33.3)	1 (6.7)	13	3 (23.1)	0 (0)
1981	11	4 (36.4)	0 (0)	10	3 (30.0)	0 (0)
1980	20	7 (35.0)	3 (15.0)	17	5 (29.4)	2 (11.8)[3]
50% and 50% of SMSA parity		19.1%	8.6%		19.1%	8.6%
KLOU						
June 1982	12	3 (25.0)	3 (25.0)	10	2 (20.0)	2 (20.0)
1982	13	4 (30.8)	2 (15.4)	10	2 (20.0)	1 (10.0)
1981	18	7 (38.9)	2 (11.1)	14	4 (28.6)	0 (0)

[1] Five of the station's employees overall and four of its employees in the top three categories are Hispanic.

[2] *See* n.11 of text, *supra*.

[3] One of the stations' minority employees was Hispanic.

		Overall			*Top Four Categories*	
Station	*Total*	*Women*	*Minorities*	*Total*	*Women*	*Minorities*
1980	16	6 (37.5)	2 (12.5)	12	3 (25.0)	0 (0)
50% and 50% of SMSA parity		16.5%	9.3%		16.5%	9.3%
WSMB						
1982	19	5 (26.3)	2 (10.5)	17	4 (23.5)	1 (5.9)
Ren. App.	19	5 (26.3)	3 (15.8)	17	4 (23.5)	1 (5.9)
1981	21	6 (28.6)	3 (14.3)	18	4 (22.2)	1 (5.6)
1980	31	9 (29.0)	3 (9.7)	26	5 (19.2)	1 (3.8)
50% and 50% of SMSA		12.7%	13.6%		12.7%	13.6%
WYNK/WYNK-FM[4]						
1982	26	6 (23.1)	3 (11.5)	22	2 (9.1)	2 (9.1)
1981	25	6 (24.0)	3 (12.0)	22	3 (13.6)	2 (9.1)
1980	23	4 (17.4)	2 (8.7)	20	1 (5.0)	1 (5.0)
50% and 50% of SMSA parity		18.0%	12.6%		18.0%	12.6%
KDBS/KRRV(FM)						
1982	17	5 (29.4)	0 (0)	15	3 (20.0)	0 (0)
Ren. App.	18	6 (33.3)	0 (0)	16	4 (25.0)	0 (0)
1981	17	6 (35.3)	0 (0)	15	4 (26.7)	0 (0)
1980	18	6 (33.3)	0 (0)	18	6 (33.3)	0 (0)
50% and 50% of SMSA parity		17.5%	12.5%		17.5%	12.5%
KLEB/KZZQ-FM						
1982	14	7 (50.0)	0 (0)	10	3 (30.0)	0 (0)
Ren. App.	19	9 (47.4)	0 (0)	13	4 (30.8)	0 (0)
1981	22	10 (45.5)	0 (0)	18	6 (33.3)	0 (0)
1980	19	6 (31.6)	0 (0)	16	3 (18.8)	0 (0)
50% and 50% of parish parity		18.7%	5.4%		18.7%	5.4%
WSLI/WXLY(FM)						
1982	30	9 (30.0)	4 (13.3)	28	8 (28.6)	3 (10.7)
1981	30	9 (30.0)	5 (16.7)	27	7 (25.9)	3 (11.1)
1980	28	7 (25.0)	5 (17.9)	26	6 (23.1)	3 (11.5)
50% and 50% of SMSA parity		21.3%	15.4%		21.3%	15.4%

[4] One of WYNK's minority employees is an American Indian.

STATEMENT
OF
COMMISSIONER HENRY M. RIVERA
DISSENTING IN PART

RE: Petition to deny certain Louisiana and Mississippi license renewal applications.

I dissent to the majority's decision to renew unconditionally the application of non-commercail Station WYES-TV. While I appreciate that public broadcasting generally is experiencing funding cutbacks, I am unconvinced, unlike the majority, that this general condition should allow the application of less exacting equal employment obligations on public broadcasters. Nor am I persuaded that this station's last minute improvement provides sufficient assurance that it will faithfully adhere to our EEO policies.

WYES documented no special financial hardship, so the majority's solicitude in bench colloquy on that score is without justification. In addition, throughout the license term, the station's employment profile showed that minorities were substantially underrepresented in upper-three jobs, despite its continued filling of several vacancies. As its license term drew to a close, the station realized that its referral sources were not optimally identifying prospective minority applicants. Its minority recruitment efforts then became more affirmative and its minority employment profile improved.

While I am pleased at the station's belated success in this regard, the Commission should have imposed a reporting condition on WYES-TV so that it could assess whether the station's recent efforts and success will be sustained. In failing to do this, the Commission has clearly signalled broadcasters that they can neglect affirmative action duties throughout most of the license term, secure in the knowledge that eleventh hour improvements will save the day. I deeply regret this signal. Its consequences are all the more troubling now that broadcast license terms have been considerably lengthened.

Common Carrier, Interconnection
Common Carrier, Interconnection, Carrier to Carrier
Common Carrier, Joint Use of Facilities
Common Carrier, Rates, Charges

Notice of Proposed Rulemaking adopted seeking comment on proposed rules and requirements to complement the adoption of access charges in Phase I of this proceeding, and the revised industry structure which will result from implementation of the Modification of Final Judgement in *United States* v. *Am. Tel. and Tel. Co.*, 552 F.Supp. 131 (D.D.C. 1982).
–Market Structure (Phase III)
CC Docket No. 78–72

FCC 83–178

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of MTS and WATS MARKET STRUCTURE, Phase III Establishment of Physical Connections and Through Routes Among Carriers; Establishment of Physical Connections by Carriers With Non-carrier Communications Facilities; Planning among Carriers For Provision of Interconnected Services, and in Connection with National Defense and Emergency Communications Services; and Regulations for and in Connection with the Foregoing	CC Docket No. 78–72, Phase III

NOTICE OF PROPOSED RULEMAKING

(Adopted: April 27, 1983; Released: May 31, 1983)

BY THE COMMISSION: COMMISSIONER FOGARTY ISSUING A SEPARATE STATEMENT; COMMISSIONER JONES ABSENT.

I. Introduction

1. Interstate and foreign communications provided by common

carriers have historically been offered through electrical connection ("interconnection") of communications facilities operated by different entities. In decisions tracing virtually to the inception of the FCC in the 1930's, we have addressed carriers' obligations to interconnect their facilities with one another, and with non-carrier facilities (*e.g.*, private communications channel facilities and terminal equipment). The development of Commission policies relating to carriers' interconnection obligations is complex. We summarize our current policies below, as they relate to this proceeding.

2. As a general proposition, carriers today are under a legal obligation to offer interconnection (both to other carriers, and to non-carrier facilities and equipment) under tariffs which are subject to FCC regulation. There are normally two basic dimensions to carriers' interconnection obligations. First, arrangements are required to compensate a carrier offering interconnection for use of its facilities in interconnected service. Second, physical, technical and operating arrangements are required to ensure that interconnection is feasible and workable, and that such interconnection does not create unacceptable levels of interference or harm to service.

3. In view of the wide range of different service offerings which are subject to the Communications Act of 1934 as amended (the "Act"), we have appropriately tailored our interconnection regulation in each instance to the specific carriers and services involved. For example, in the traditional telephone service field, compensation and physical arrangements for carrier-to-carrier interconnection historically were largely worked out by the industry itself without direct regulatory intervention. The FCC served primarily as a forum for complaints concerning issues which could not satisfactorily be resolved by the carriers through negotiation, and as a forum for resolving issues of jurisdictional cost and revenue apportionment ("separations") which had bearing upon provision of interconnected telephone services. With the advent of new entry by competitive common carriers, this Commission was called upon to take a more active regulatory role with respect to carrier-to-carrier interconnection for telephone services.

4. In the telegraph and record service field, under provisions of 1943 legislation permitting Western Union to acquire Postal Telegraph's facilities[1], the Commission was required specially to regulate compensation and traffic division arrangements for traffic involving interconnection of Western Union's domestic facilities with the international facilities of international record carriers ("IRCs").

5. Other communications services have directly or indirectly involved interconnection of carriers' facilities to those of one another

[1] These provisions were formerly in Section 222 of the Act, and were recently supplanted by the Record Carrier Competition Act of 1981, P.L. 97–130, 95 Stat. 1687, Dec. 29, 1981 ("RCCA").

or to non-carrier facilities, including domestic satellite services, microwave radio services and video services. Here too, we have addressed the compensation and physical arrangements for such interconnection.

6. In some of the foregoing interconnection circumstances, we have merely clarified that a legal obligation to offer interconnected service exists, and have allowed the carriers themselves in carrier-initiated tariffs (or private contracts in some circumstances) to determine the arrangements for interconnection. This largely was the historic pattern for traditional telephone services provided jointly by the integrated Bell System and the Independent telephone companies. The involved carriers had great incentives to interconnect with one another and the details, while sometimes controversial, could usually be worked out by the involved carriers without regulatory intervention. The American Telephone and Telegraph Company ("AT&T") controlled (and controls) the great bulk of all telephone facilities in this nation, through direct control of long distance facilities by its Long Lines Department, and through indirect control through ownership of the associated Bell Operating Companies ("BOCs"). The BOCs access approximately 80% of the nation's telephones (and approximately 50% of the land area of the nation). Quite naturally, with this degree of direct and indirect control, AT&T largely could itself determine the evolution of telephone service, including the terms of interconnection. Moreover, even without such control, the research and development resources of AT&T (primarily in the Bell Telephone Laboratories and in Western Electric Company, and to some extent in AT&T's General Department) effectively could exercise strong influence over the evolution of telephone services, including interconnection.

7. Moreover, AT&T's strong influence over interconnection has not been limited to traditional telephone services, as many non-telephone common carrier services have required interconnection to AT&T or BOC facilities. For example, while Western Union itself has the right to construct long distance and local telegraph facilities (a right which predates the development of the telephone and of AT&T), in fact Western Union almost exclusively employs local telephone facilities to reach its subscribers. Similarly, while we have authorized the provision of specialized and domestic satellite services by new entrants since the late 1960's, because of spectrum congestion the carriers involved have been unable to bring their services directly to their subscribers in urban areas, and have been required to use local telephone facilities on an interconnected basis to reach their urban subscribers[2]. Again, given AT&T's predominant control of such facilities, AT&T has largely determined the evolution of these interconnection offerings, subject to regulatory constraint.

[2] Such facilities have been termed "entrance facilities."

8. Finally, the Act itself has, of course, affected this Commission's historic role with respect to interconnection. For example, all carriers engaged in the provision of interstate and foreign communications, including carriers which do so solely by virtue of interconnection, are subject to Sections 201 through 205 of the Act, which provisions include interconnection requirements. However, under Sections 2(b) and 221(b), the states and not the FCC regulate the offering of local (*i.e.*, exchange) services to carriers' subscribers. Where carrier-to-carrier interconnection for provision of interstate and foreign services is involved, this Commission's authority over all interconnection arrangements, including compensation arrangements, is preeminent. But, where interconnection of carriers' local facilities to those of non-carriers is involved (*i.e.*, for interconnection of terminal equipment, or of non-carrier private communications facilities), we have limited our role to one of assuring that interconnection is made available without discrimination, but without otherwise regulating local service compensation arrangements[3].

A. Changes Necessitating Action

9. A number of recent major events are causing us to examine comprehensively issues which bear upon carriers' interconnection offerings. First, we recently adopted a *Third Report and Order* in this proceeding, *93* FCC2d *241*, FCC 82–579, released Feb. 28, 1983 (hereafter, "Third Report"), addressing access charges. In the Third Report, we examined the more competitive nature of communications, and unreasonable and discriminatory ratemaking practices which existed in connection with provision of interstate and foreign services on a direct and interconnected basis. We concluded that the historic traditional telephone industry revenue division practices must be replaced by a system of access charges (*i.e.*, new arrangements for compensating carriers for use of their facilities when providing service on an interconnected basis). In part, this was the result of the increasingly competitive nature of telecommunications, and various forms of disparate treatment of service offerings and interconnection offerings made to other carriers and to subscribers by carriers. In part, this was a response to changes, discussed below, which are likely to flow from the revised antitrust decree governing AT&T and the BOCs. While our Third Report revises, on a nationwide basis, the compensation arrangements for interconnected service, it does not address the physical, technical and operational details of such interconnection. We believe that such matters are important, that they similarly should be addressed, and we propose to do so in these further proceedings.

[3] *See, e.g.*, Carterfone, 13 FCC2d 420, recon. denied, 14 FCC2d 571 (1968); North Carolina Utilities Comm'n v. FCC., 537 F.2d 787 (4th Cir.), cert. denied, 429 U.S. 1027 (1976) ("NCUC I"); North Carolina Utilities Comm'n v. FCC, 552 F.2d 1036 (4th Cir.), cert. denied, 434 U.S. 874 (1977) ("NCUC II").

10. Second, on August 24, 1982, the United States District Court for the District of Columbia entered a Modification of Final Judgment ("MFJ") in *United States* v. *Am. Tel. and Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982), 1982–2 Trade Cas. (CCH) ¶ 64,979, *aff'd sub. nom.*, *Maryland* v. *United States*, ___ U.S. ___ , 51 U.S.L.W. 3628 (U.S., Mar. 1, 1983), requiring AT&T to divest the BOCs no later than eighteen months from entry, and establishing constraints and obligations on the subsequent activities of AT&T and the divested BOCs. Bearing most importantly on provision of interstate and foreign services through interconnection is a requirement in Section II of the MFJ, and related Appendix B, that each BOC:

> provide to all interexchange carriers and information service providers exchange access, information access, and exchange services for such access on an unbundled tariff basis, that is equal in type, quality, and price to that provided to AT&T and its affiliates. As noted, the Third Report in this proceeding addresses the "price" aspects of the BOCs' access and service provision obligations under the MFJ, but its does not address directly the physical, technical and operating arrangements for such interconnection.[4]

11. To some extent, these issues are addressed in the MFJ. For example, Appendix B acknowledges that equal treatment of access will require a phasing-in during 1984–86, and even thereafter in the case of smaller, older central offices upon an appropriate showing to the court. However, the MFJ is silent with respect to interconnection obligations which might govern AT&T after divestiture of the BOCs. Moreover, the exchange access provisions of the MFJ apply generally to provision of interconnection by the BOCs to "interexchange carriers" and, except with respect to provision of information access, the decree is silent as to an obligation of the BOCs to offer interconnection to facilities of non-carriers. These interconnection issues are important, and have been addressed by this Commission in the past. For that reason, we believe it appropriate to clarify their treatment in the changing industry structure.

12. Third, the industry structure that would result from implementation of the MFJ would, through the provisions of the MFJ, create specifically detailed arrangements for access to the BOCs' subscribers (as noted, approximately 80% of the nation's telephones), but not to the subscribers of non-Bell Independent telephone companies. We believe that the purpose of the MFJ is consistent with regulatory policy of this Commission to create, on a nationwide basis, opportunities for competitive providers of interstate and foreign services to access their subscribers through interconnection with

[4] The entered Modification of Final Judgment is reproduced in United States v. Am. Tel. and Tel. Co. *supra.*, and parties may refer thereto in formulating their comments in this proceeding. Furthermore, if less than equal access is provided by a BOC, it is permitted to file access tariffs reflecting the lesser cost of such access, Section VIII.F of the MFJ. This BOC tariff filing obligation does not affect the authority of regulators subsequently to prescribe the rates, terms and conditions of such access (or, in the terms of this notice, "interconnection").

local telephone companies' facilities. The FCC and the courts have explicitly imposed such interconnection obligations on all local telephone companies, BOCs and Independents, and as noted we have addressed the compensation aspects of such interconnection in the Third Report herein.

13. In the altered industry structure of the MFJ, competitive interexchange carriers will have a detailed blueprint for interconnection to facilities for access to BOC subscribers (through the provisions of the MFJ), but not for subscribers in Independents' service areas. The object of the MFJ under the antitrust laws is creation of a competitive telecommunications marketplace nationwide, which is complementary to our mandate under the Act to ensure the availability of rapid, efficient communications with adequate facilities at reasonable charges, also on a nationwide basis. We have fostered the development of nationwide services in the past, and we believe it important to continue to do so upon implementation of the MFJ. For that reason, we propose generally to require, pursuant to our authority under the Act, that the Independent telephone companies offer interconnection (or in MFJ terms, exchange and information access) on a basis similar to that of the divested BOCs, in order that interstate and foreign services may be planned and offered on a reasonably uniform basis nationwide.

14. Fourth, the physical, technical and operational details of interconnection have increasingly become controversial in recent years, across a broad range of services and carriers. In some cases, we have been required to adopt specific regulations governing interconnection, *e.g.*, regulations in Part 68 of our rules governing interconnection of terminal equipment, wiring, and protective apparatus. In other cases, we have adopted specific tariff-prescribing orders governing carriers' interconnection offerings, *e.g.*, our original *Carterfone* decisions,[5] our "piece out" decision,[6] and our decisions implementing the Record Carrier Competition Act of 1981.[7] In other cases, we have served as a forum for carriers themselves to negotiate interconnection arrangements.[8]

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[5] Carterfone, supra. n. 3.

[6] Am. Tel. and Tel. Co., 60 FCC2d 939 (1976) ("Piece out"); *see also*, Am.Tel. and Tel. Co., 71 FCC 1 (1979) ("ARINC").

[7] Interconnection Arrangements Between and Among Domestic and International Record Carriers, 89 FCC2d 988 (1982) ('Interim Order"), ___ FCC 2d ___ , FCC 82–264, released June 11, 1982 ("Rejection Order"), ___ FCC2d ___ , 48 Fed. Reg. 12372 (Mar. 24, 1983) ("Store-and-forward and TWX/Telex Conversion").

[8] E.g., AT&T (Facilities for Use by Other Common Carriers), 52 FCC2d 727 (1975) ("Docket 20099") and Exchange Network Facilities for Interstate Access, 71 FCC2d 440 (1979) ("ENFIAA"). While these proceedings were resolved to some extent through informal carrier negotiation under FCC auspices, it should be noted that subsequent thereto, compensation issues have remained controversial, and we have been almost continuously called upon to interpret their results and to rule on proposed tariffs which affect or change their results. Thus, even where carrier agreements in lieu of direct FCC regulatory intervention have been employed, the

15. While we have no desire unnecessarily to extend direct and active regulation to activities which satisfactorily may be resolved without or with reduced regulatory intervention, it is clear that in a more fragmented and competitive telecommunications industry the interconnection "ground rules" must be set at the outset, particularly inasmuch as interconnection often represents the sole means for competitive carriers (and providers of equipment and facilities) to access their customers. When Congress considered this issue recently in the context of enacting the RCCA it recognized that the record carriers' interconnection practices largely would determine the extent of competition. For this reason, the FCC was directed to prescribe record carriers' interconnection arrangements if the carriers could not themselves reach a voluntary agreement (which, in fact, they were unable to do). This principle is not limited to record services, and in our view applies to all interconnection in a more fragmented and competitive telecommunications environment.

16. Moreover, we believe that the developing pattern of AT&T no longer unilaterally controlling the planning and evolution of communications services in this nation, which pattern was developing as a consequence of competition and new entry, will likely be accelerated upon implementation of the MFJ. While AT&T will continue itself to control a very large portion of this nation's long distance facilities, over time it is likely that the scope of this control may well diminish as competition continues to develop, which will impair AT&T's ability itself to implement its planning decisions. Concommitantly, AT&T will be divested of the BOCs and will lose the ability directly to mandate implementation of much such planning.

17. Our policies are to promote the ability of competitive carriers (and non-carriers through use of private facilities) to innovate and to offer diverse communications services, a result which may have to some extent been impeded in the past by AT&T's control over telecommunications planning and evolution. Such innovation is a positive benefit of competition and new entry. However, we cannot fail to recognize that we have a statutory mandate to foster the development of nationwide (and worldwide) services; at some point, if communications becomes too "balkanized" this mandate might be frustrated. Furthermore, communications is a capital-intensive industry which often involves relatively long planning periods for

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net result has largely been one of FCC regulation in any event, with respect to compensation.

Conversely, technical, operational, maintenance and administrative issues have largely been resolved by the affected carriers informally during the course of periodic public meetings among the carriers, under the supervision of the Common Carrier Bureau, *see*, 52 FCC2d at 733, to address such issues, as they arose in implementation of the Docket No. 20099 and ENFIA settlement agreements.

construction of new facilities (measured in years and in some cases in decades). AT&T in the past was a forum for amalgamation of various carriers' and subscribers' future communications needs for service, and for synthesis of appropriate advance construction plans. In the more competitive telecommunications industry which is evolving, and with divestiture by AT&T of the BOCs, an alternative advance planning mechanism to that traditionally performed by AT&T would appear to be required, and we are proposing in this proceeding to establish such a mechanism.

18. Finally, some forms of planning among carriers will be required to fulfill mandates of the Communications Act other than those related to nationwide service, most notably creation of administrative mechanisms and standby capabilities to support emergency communications bearing upon national defense and safety of life and property (national security and emergency preparedness, or "NSEP", communications capabilities). Here too, AT&T has generally coordinated the telephone industry's role in such matters in the past, and upon implementation of the MFJ alternatives may be required[9]. In this Notice, we are proposing the creation of appropriate mechanisms to address advance planning of interconnection by carriers, and we envision that these mechanisms will be useful both for planning associated with provision of routine services, and for NSEP communications. With respect to the latter, it should be noted that we are proposing in this proceeding to create a framework for planning which might involve NSEP implementation, but we are not addressing the important issues of what planning will be required, and the voluntary and regulatory administrative and other mechanisms which may prove necessary to carry out such planning[10].

19. Furthermore, while we are proposing in this Notice creation of a framework for advance planning by carriers, we do so in full awareness that such planning among competitors (and potential competitors) must be limited to the absolute minimum consistent with achievement of our statutory mandate, to minimize any distortion of competition. As is discussed below, in addressing limited joint planning generally, and planning in behalf of NSEP communi-

[9] Under the MFJ, the divested BOCs are required to establish a single point of contact organization for these emergency services, to coordinate and to direct provision by the BOCs of NSEP services. However, it is unclear how this point of contact organization will relate to planning for administrative mechanisms and standby facilities arrangements involving AT&T and other interexchange carriers, or to such arrangements involving non-BOC Independent telephone companies.

[10] Thus, we conclude that other planning issues, which are focused primarily on exchange carriers' interconnection offerings, and which are involved in the proposals in this proceeding, are sufficiently related to planning for NSEP capabilities to justify our proposing that the planning addressed herein include NSEP.

cations specifically, we propose to be guided by analogous statutory provisions which have been in force since the early 1950's and which appear to achieve an appropriate balance between competition objectives and emergency planning objectives.

B. Summary of Proposals

20. We view this proceeding as complementary both to the Third Report addressing access compensation arrangements, and to the provisions of the MFJ addressing certain BOC interconnection obligations. With respect to the former, we are proposing to address the physical, technical and operational details of interconnection among carriers' facilities and between carriers' facilities and those of noncarriers, generally through a proposed requirement that such details be addressed in carriers' exchange access tariffs subject to FCC regulation. With respect to the latter, we are proposing to extend to all carriers interconnection requirements analogous to those of the MFJ (the latter of which is limited solely to the BOCs), and to clarify that such interconnection obligations apply both to interconnection with other carriers' facilities, and to interconnection with non-carrier communications facilities[11]. Finally, we are proposing to create carefully circumscribed mechanisms for the planning by carriers for the provision of interconnected services.

II. Discussion of Specific Proposals

A. Interconnection by Independent Telephone Companies

21. As noted, if the MFJ is implemented in its present form,[12] the BOC facilities which offer access to approximately 80% of the

[11] To the extent that exchange services may be involved in the offering of interconnection to subscribers' terminal equipment or private communications facilities, we shall limit our consideration solely to the physical, technical and operational details of such interconnection, and not to the exchange rates themselves, consistent with the provisions of Sections 2(b) and 221(b) of the Act and NCUC I, 537 F.2d at 793–95 and NCUC II, 552 F.2d at 1045–48, supra. n. 3. It is our intent in this proceeding neither to seek to extend, nor to contract, our limited interconnection jurisdiction over exchange offerings which, through interconnection, support the provision of interstate and foreign services.

[12] Implementation of many aspects of the MFJ is subject to approval by the Commission. It might be noted that the Commission has expressed general approval of the MFJ in its *amicus* comments to the federal district court during the course of the court's Tunney Act proceeding on the public interest implications of the MFJ. *See*, United States v. AT&T, 552 F.Supp. at 211. In such circumstances, it is reasonable to explore in this proceeding extension of the overall principles of the MFJ to other carriers (e.g., non-Bell telephone companies) or to other circumstances not specifically addressed therein (e.g., interconnection with non-carrier facilities), subject to the outcome of any FCC approval proceedings on the MFJ itself. The instant proceeding may prove lengthy, and we conclude, consistent with the provisions of Section 4(j) of the Act, that such an approach is warranted to permit this proceeding to proceed to conclusion prior to full implementation of the MFJ.

nation's telephone subscribers will be required to be made available for interconnection under the exchange and information access provisions of the MFJ. These obligations are addressed variously in the MFJ, using concepts which are complementary to, but somewhat different than, concepts employed by the Commission in addressing analogous interconnection issues in the past. While we do not disagree with the structure envisioned by the MFJ, we believe it important to clarify the following discussion by identifying differences between the access structure of the MFJ and the jurisdictional split between intrastate offerings, and interstate and foreign offerings, in the Communications Act, as our proposals in this proceeding are pursuant to our authority under the Act.

1. Access Jurisdiction

22. Under the Act, the FCC is granted jurisdiction over interstate and foreign communications by wire and radio generally, but jurisdiction is reserved to the states over intrastate and exchange communications. Initially, under this jurisdictional split of regulatory authority, we regulated rates, tariffs and associated practices governing interstate and foreign services alone. However, often the same facilities are employed both for provision of interstate and foreign communications subject to our direct jurisdiction, and for the intrastate and exchange services over which state authority is reserved. In such circumstances, under developed case law[13] the FCC has plenary jurisdiction over interconnection even to exchange facilities, where such interconnection is required for interstate and foreign communications to proceed. However, we have not exercised jurisdiction over the rates for the intrastate toll and exchange offerings made over such facilities, and have limited our exercise of ratemaking jurisdiction to use of such facilities for interstate and foreign calling. In sum, under the Act there is a division of regulatory responsibilities between the Commission and the states with respect to ratemaking, and there is preemptive federal authority over the tariffs and associated practices governing interconnection. Where ratemaking authority is so divided, the division is between intrastate and exchange services on the one hand, and interstate and foreign services on the other.

23. The MFJ also establishes market definitions, for division of responsibilities and opportunities for AT&T and the BOCs. Rather than using the state line boundaries used primarily in the Act, the MFJ appears generally to seek a division between those local service undertakings which are implemented using exchange-like facilities, and those service undertakings which are implemented using long distance facilities which connect groups of exchanges with one another. The basic analytic distinction in the MFJ is between a

[13] *E.g.*, NCUC I and NCUC II, n. 3 supra.

species of exchange service (which may encompass more than the "telephone exchange service" definition of Section 3(r) of the Act), and interexchange service. Under the MFJ, the BOCs are limited to provision of the former (i.e., exchange-like services) and are not permitted to offer the latter (*i.e.*, interexchange services). They are, however, permitted and indeed required to participate in the provision of interexchange services by others on an interconnected basis (deemed "access" in the MFJ).

24. To describe the exchange-like offerings which may be made by the BOCs under the MFJ, and the concommitant interconnection ("access") obligations of the BOCs, the term Local Access and Transport Area ("LATA") has generally been employed to distinguish the exchange-like services of the MFJ from the traditional "exchange" and "toll" classifications used in regulatory statutes such as the Communications Act.[14]

25. While the BOCs are limited to provision of communications within such a LATA, and are prohibited from offering communications between LATAs, they are required to offer interconnection to others so that such others may provide inter-LATA and information services to the BOCs' subscribers. As is discussed below, we are proposing to impose on non-Bell telephone companies interconnection obligations patterned after those of the MFJ. However, in pursuing such an approach, we must be mindful of the differences between the jurisdictional divisions of the Act, and the interexchange/LATA distinctions employed in the MFJ. Interstate and foreign communications are subject to our jurisdiction regardless of whether the interexchange or LATA classifications of the MFJ are applicable to such communications. Conversely, intrastate toll and exchange communications are not (except with respect to intercon-

[14] The term "LATA" does not appear in the MFJ; it has been used by various parties in their filings with the district court to avoid confusion. What is now generally termed a LATA is defined in Section IV.G of the MFJ as an "exchange area" or "exchange". Absent court approval, such a LATA is confined to the boundaries of a single state, and encompasses contiguous local exchange areas (presumably, in the traditional regulatory sense) which serve common social, economic, and other purposes. With court approval, a LATA may extend across a state boundary (somewhat similar to exchanges under Section 221(b) of the Act). Also, with court approval, a LATA may include multiple standard metropolitan statistical areas (or consolidated statistical areas in the case of densely populated states), but not otherwise. Also, the MFJ utilizes a facilities split between "class 4" and "class 5" switching facilities; groups of "class 5" facilities may be accessed in common for "access" under the MFJ.

These definitions do not preclude the creation of geographically very large LATAs, and indeed in its filings with the federal district court AT&T had sought to treat whole states as single LATAs, notwithstanding that much communication within such a large LATA would be viewed as intrastate toll service, and not exchange service, under traditional regulatory classifications such as those of Sections 3(r) and 3(s) of the Act. Certain of these were approved by the district court. United States v. Am. Tel. and Tel. Co., No. 82–0192, slip op. at 141–45 (D.D.C. Apr. 20, 1983.)

nection to facilities used in common for such state-regulated offerings and interstate or foreign communications), even if within the competitive inter-LATA category of the MFJ (for which interconnection by the BOCs is mandated under the MFJ).

26. In sum, because the jurisdictional divisions of the Act are somewhat different than the distinctions of the MFJ, we must of necessity decouple from the interexchange/LATA distinctions of the MFJ. To the extent that a LATA crosses state boundaries, interstate services within such a LATA may be subject to full Commission regulatory authority (if such service is not "exchange" service within the meaning of Sections 3(r) and 221(b) of the Act)[15]. Conversely, AT&T has proposed establishment of multiple LATAs in many states. Service between such LATAs, while "interexchange" within the meaning of the MFJ and invoking the "access" obligations of the MFJ, is intrastate toll service under Section 3(s) of the Act and not necessarily subject to full Commission jurisdiction. As a practical matter, it would be desirable for local telephone companies to interconnect with intrastate toll services on the same basis as they might with the interstate and foreign services subject to our direct jurisdiction. Such an approach would promote technical uniformity, and potentially might well contribute to telecommunications efficiency. Indeed, because unitary exchange facilities have historically been interconnected both with intrastate and interstate (and foreign) toll facilities on the same basis, disparate interconnection arrangements for the two groups of services may not be feasible. However, in this proceeding we shall address solely interconnection to exchange facilities to provide interstate and foreign communications. We do not at this time propose either expansion, or contraction, of our regulatory authority over such interconnection[16].

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[15] AT&T had sought from the district court exemptions from the provisions of Section IV.G of the MFJ to configure certain interstate LATAs, and in its recent decision addressing AT&T's LATA proposals, the district court has approved many LATAS which cross state boundaries. *See*, United States v. Am. Tel. and Tel. Co., slip op. at 23–24, n. 13 supra.

[16] As an example of the circumstances which require such a decoupling, and without our reaching a judgment on the desirability of such an example, AT&T had sought from the district court authority to include an entire state, Delaware, in a Pennsylvania LATA. The FCC has authorized competitive provision of interstate service, which authorization would include service between Delaware and portions of Pennsylvania in this LATA. While the district court has sought to ensure that competitive interexchange service providers are not disadvantaged by this arrangement, which it approved, United States v. Am. Tel. and Tel. Co., slip op. at 72–76, n. 13 supra, the interconnection obligations of the MFJ are addressed generally to provision of interconnection to facilitate inter-LATA service, not intra-LATA service as might be involved in Delaware to Pennsylvania calling. Thus, a "gap" could be created between the interconnection "blueprint" of the MFJ and the less detailed existing federal interconnection requirements for such interstate services. Similar such circumstances might arise elsewhere, where portions of states have been included in interstate LATAs, supra n. 14, and interstate service not qualifying for "exchange" treatment under

2. Access offerings of Independent telephone companies

27. We propose in this section to extend, pursuant to our regulatory authority under the Act, to non-Bell (Independent) telephone carriers interconnection obligations patterned after those which will govern the BOCs under the MFJ. Independent telephone companies currently are required to interconnect their exchanges with terminal equipment, with non-carrier communications facilities, and with competitive interstate carriers' facilities, pursuant to decisions of this Commission and of the courts[17]. However, as was the case of interconnection to the BOCs' facilities prior to adoption of the MFJ, the Independents' interconnection obligations have not been fully described and "fleshed out" in the past. Rather, we have reacted to specific complaints and have resolved controversies which have arisen[18].

28. What is altered in the environment of implementation of the MFJ is that under the provisions of the decree, competitive providers of interexchange services will in the future have a detailed "blueprint" for interconnection to the BOCs' exchange facilities. In these circumstances, we believe it most appropriate, in view of our statutory mandate to promote the development of efficient and broadly available service on a nationwide basis, to ensure the establishment of a similarly detailed "blueprint" for interconnection to the Independents' facilities. However, in so doing, we must be mindful that truly equal access to carriers' exchange facilities is not immediately possible in the BOCs' service areas, and that it may be less so in the Independents' areas because of intrinsic limitations of existing facilities. We discuss below the treatment in the MFJ of transition towards interconnection equality for the BOCs, and our proposals to address these issues analogously in the context of interconnection to the Independents' facilities.

29. The facilities of neither the BOCs nor the Independent

Section 221(b) of the Act is involved. It is important that our pro-competitive interstate service policies not be frustrated, directly or indirectly, by the failure of the MFJ more explicitly to address such interconnection.

[17] *E.g.*, Interstate and Foreign Message Service, 56 FCC2d 593 (1975), 57 FCC2d 1216, 58 FCC2d 736, 59 FCC2d 83 (1976), *aff'd sub. nom*, North Carolina Utilities Comm'n v. FCC ("NCUC II"), supra. n. 3; AT&T (Piece out) and AT&T (ARINC), supra. n. 6; Specialized Common Carrier Services 24 FCC2d 318 (1970), *aff'd sub. nom*, Washington Utilities & Transportation Comm'n v. FCC, 513 F.2d 1142 (9th Cir.), cert. denied, 423 U.S. 836 (1975), *see also*, Bell Tel. Co. of Penn. v. FCC, 503 F.2d 1205 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026 (1975); Lincoln Telephone and Telegraph Co., 72 FCC2d 724, 74 FCC2d 196 (1979), 78 FCC2d 1219 (1980), *aff'd*, 659 F.2d 365 (D.C. Cir. 1981); MCI Telecomm'ns Corp. v. FCC, 561 F.2d 365 (D.C. Cir. 1975), *cert. denied*, 434 U.S. 1040 (1978) ("Execunet I"), 580 F.2d 590 (D.C. Cir.), *cert. denied*, 439 U.S. 980 (1978) ("Execunet II"), and Order reproduced in appendix to Lincoln Telephone, 659 F.2d 365, supra. ("Execunet III").

[18] *E.g.*, Lincoln Telephone and Telegraph Co., supra.; United Tel. Co., 77 FCC2d 1015 (1980).

telephone companies are homogeneous. Both include central offices which range from relatively older electro-mechanical (*e.g.*, step-by-step, crossbar and panel) offices which are inflexible in their capabilities, to modern stored-program controlled electronic offices the capabilities of which may be changed (consistent with the limitations of the overall hardware) through software modifications. Both the relatively inflexible older offices and the more flexible newer electronic offices were designed in a monopoly environment to perform switching within a single supplier's central office and to perform switching to a single supplier of intrastate, interstate, and foreign long distance services. As interstate service competition was introduced in the recent past, an issue of significant controversy has concerned whether and to what extent other (interstate) long distance service providers may achieve access to telephone companies' central offices which is equal to that provided the traditional single supplier. It generally was claimed that equal access was not feasible because of the inherent design of the existing central office facilities, and for that reason interconnection has not been equal. Several remedies for this unequal access have been proposed, including a requirement that the inequality be minimized to the extent feasible, and proposals have been made that those who obtain better access should provide more compensation than others. We shall not address the latter remedy in these proceedings, as this "compensation" issue has been addressed in the Third Report and Order. Rather, we shall confine our proposals to ones which minimize, to the extent feasible, any interconnection inequality.

30. The MFJ represents one approach to the difficult issues surrounding the inability of existing non-electronic central offices, as a practical matter, to support truly equal access. First, as was noted previously, the MFJ contains phasing-in procedures to provide the BOCs an opportunity to replace with newer stored-program controlled switches many of the older central offices to which equal access will be sought. Equal access overall is not required until 1986 under the phasing-in schedule of the MFJ. Second, the MFJ contains exception provisions under which the BOCs may refuse provision of equal access in older and smaller central offices. The specific mechanism of the MFJ is to create a defense for the BOCs for failure to make equal access available in such offices in the event that an interexchange carrier complains to the district court of a refusal to provide equal access.

31. Broader transitional procedures are also specified in the MFJ. For example, until such time as the nationwide numbering plan is revised, access to all long distance service providers under the MFJ need not be on the same dialing basis. A customer may be permitted to access one service provider without dialing extra digits, although extra digits may be required to access other suppliers' services. However, the BOCs must give each of their subscribers the

opportunity to preselect *which* interexchange service provider will automatically be accessed without dialing extra digits. When the nationwide numbering plan ultimately is revised, access to all interexchange carriers' services is to be placed on the same basis.

32. We tentatively conclude that the approach of the MFJ as a general matter would be workable if applied to the Independent telephone companies. However, we must acknowledge that the Independents' central offices may be statistically weighted more towards the less flexible older electro-mechanical switching facilities than are those of the BOCs. In the MFJ, there is an exception mechanism applied to the BOCs for such cases. If the Independents' facilities more commonly would qualify for such exception treatment than those of the BOCs, the exception could well become the rule. The specific approach of the MFJ is to permit the BOCs to refuse equal access in these exceptional cases, and the BOCs are provided a defense before the district court. Such an administrative approach may be warranted for truly exceptional cases, but in our view it could prove unworkable if such situations were common, as may prove to be the case of the Independents' central offices.

33. It should be noted that access to interstate services is required to be offered pursuant to access tariffs which are subject to our regulatory review and jurisdiction, under principles adopted in the Third Report and Order, and as is discussed below, we are proposing that interconnection be offered generally in the access tariffs. In view of this, we believe it reasonable to utilize such tariffs as an appropriate administrative mechanism for addressing unequal interconnection offerings by Independents. We tentatively conclude that the issues of unequal access may best be addressed by adopting principles in this proceeding governing tariffs which are to be filed, and we propose to do so herein. As an express goal of this proceeding, we are seeking to address all major possibilities which may arise. But, to the extent that a given Independent telephone company might wish to raise special circumstances not previously addressed or accommodated in the principles which might be adopted, we believe that flexible treatment might be warranted, in view of the disparities in size, resources, and facilities, which may exist among various Independent telephone companies. Thus, a given company should be free to do so upon an appropriate showing that special treatment is warranted.

34. Specifically, we propose to adopt principles requiring that interconnection be offered by the Independents in their access tariffs, to be filed subject to our regulatory jurisdiction in accordance with the Third Report and Order. Furthermore, we propose to review such tariffs initially under principles patterned generally after the substantive "access" requirements of the MFJ, as follows:

a. *Access to existing stored-program controlled central offices.* Programming of

existing stored-program controlled central offices shall be modified, during a three year period[19], to support access to the services of all interexchange carriers which is equal in all respects, except that the minimum number of digits necessary to reach other than a carrier pre-selected by the subscriber may be utilized until such time as the nationwide numbering plan is changed. At such time as the central office modification is completed, existing subscribers shall be given an option to pre-select a specific interexchange carrier which is interconnected with the exchange, and no additional digits shall be required for the subscriber to reach the services of that carrier. Thereafter, new subscribers shall be given this choice at the time when service is initially arranged. In both cases, the selection may subsequently be changed by the subscriber at his or her option. Until such time as access is provided under this subparagraph, access shall be made available in accordance with subparagraph c. below.

b. *Access to newly-installed stored-program controlled central offices.* Within two years[20], all new stored-program controlled offices shall be initially deployed with the capabilities required under subparagraph a. above.

c. *Access to existing electro-mechanical central offices (e.g., step-by-step, crossbar and panel).* To the extent feasible, such offices shall be modified to offer the capabilities identified in subparagraph a. above, utilizing techniques such as interconnection on a tandem basis where common equipment is capable of supporting such operation. If ANI (automatic number identification) capabilities or subscriber billing capabilities are capable of being made available to more than one interexchange carrier, to the extent the same is requested by such carriers they shall be made available in the same manner as is specified in the MFJ. If preselection of a particular carrier which might be accessed without dialing additional digits is not possible because of inflexibility of the electro-mechanical switching facilities, at minimum the exchange carrier must make available seven digit local telephone number access, with facilities and capabilities no worse than those provided in connection with PBX trunk service by the carrier. The carrier must make available transmission capabilities (as opposed to switching and billing) which are no worse than those provided the traditional interexchange service provider accessing its office, and it shall provide access, to the extent possible, which uses the minimum number of accessing digits, and which makes possible access from rotary dial equipment to the services of each interexchange carrier[21].

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[19] The BOCs will have had approximately three years from initial adoption of the MFJ to relatively full implementation, and this strongly suggests that a three year period for the Independents to make similar programming modifications to their existing stored-program control switching facilities is reasonable. We specifically invite comment on the reasonableness of this proposed period, and on whether different periods may be appropriate for different types or units of stored-program control central office switching equipment.

[20] It is assumed that suppliers of central office switches which are to be newly deployed will be able to create programming to support equal access more expeditiously for new equipment (i.e., in two years) than might be the case for programming modifications to existing switches (i.e., the three year period proposed in the previous subparagraph). Furthermore, it would appear that such suppliers would have great incentives to do so, if they wish to seek to supply new central office switches to the BOCs. However, we specifically invite comment on the reasonableness of the proposed two year period.

[21] We recognize that there is wide variability in deployed electro-mechanical central office switching equipment, and in proposing adoption of the principles in subparagraph c. we have sought to differentiate dialing and billing capabilities, to which equal access may be impracticable, from communications channel capabilities (e.g., gain, linearity, noise characteristics, etc.), to which equal access would appear practicable without material modifications. Our guiding principle in

35. To ensure that the foregoing principles, or alternatives which may be adopted as a result of these proceedings, are complied with, and to fulfill the substantive requirements of Sections 202(a) and 203(c) of the Act, as noted we are proposing to utilize the vehicle of access tariffs for carriers to make known the basis upon which interconnection will be offered to interexchange carriers. However, we wish to minimize our regulatory role over such offerings, and to encourage, to the maximum extent feasible, voluntary resolution by the affected interexchange and exchange carriers of any disputes which may arise. We believe that one method of achieving this result might be to require the access tariff filings to indicate whether there has been precoordination of the filing with interexchange carriers, as a means of "flagging" to our staff and to interested interexchange carriers the filings which will not be controversial. Furthermore, to the extent that exchange carriers may file joint or common access tariffs (i.e., throught the Exchange Carriers Association procedures in the Third Report and Order) it would be desirable to create a mechanism under which individual carriers might continue to concur in joint or common access tariffs, but still indicate their particularized interconnection offerings. We invite comment on procedural and administrative mechanisms to achieve these results, and which minimize, to the extent possible, the flow of unnecessary paper. In any event, it might be noted that the administrative framework which we are proposing to accomodate offerings of unequal access is somewhat different than the exception approach of the MFJ, but in view of the possibility that unequal access will be more common in the Independents' service areas than those of the BOCs, we believe that it better will comport with the requirements of Sections 202(a) and 203(c) of the Act[22].

C. Interconnection of Exchange Carrier's Facilities With those of Non-Carriers, and Related Tariff Issues:

36. Our considerations here are related to, but somewhat different than, those involved in the previous section. There, we have clarified that existing interconnection policies remain applicable to Independent telephone companies, but we have, to some extent, proposed that additional interconnection capabilities which are not necessarily being made available currently be made available by the

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phrasing the proposed requirements is that any inequality in the treatment of interexchange carriers must be minimized to the extent practicable. We invite specific comment on our proposed formulation, and upon alternatives which might be more reasonable or more practicable.

[22] Of course, the BOCs will remain bound by the exception requirements of the MFJ. Furthermore, identification in their tariffs by the BOCs of locations where equal access will not be made available would similarly comport with the requirements of the Communications Act, and for that reason our proposal in this regard is not limited to the Independent telephone companies.

Independents in the future. Here, we are addressing solely existing interconnection obligations of the Independents and the BOCs, and we are proposing merely to clarify how these offerings are to be made to the public, as a matter of tariff policy, in the future.

37. Specifically, in the past the Commission has mandated interconnection to non-carrier communications facilities and premises terminal equipment through orders and rules in Part 68 of the Commission's rules which prescribed provisions in AT&T's interstate tariffs, and which also effectively prescribed the terms of exchange carriers' offerings. This use of our prescriptive authority over the interstate tariffs subject to our direct jurisdiction under the Act ensured that all telephone companies would be bound by our specific prescribed requirements, since all telephone companies concurred in AT&T's tariffs in the monopoly supply environment of the past.

38. However, telecommunications is changing. First, it is unclear whether local telephone companies will continue to concur in tariffs of a single entity, AT&T, for the provision of interstate and foreign services in the future. An end-on-end tariff environment, with separate tariffs for the exchange access portion and for the long distance service portion, may become possible or desirable in the increasingly competitive telecommunications industry. Second, AT&T is no longer the sole long distance service provider. To maintain the obligation of exchange carriers to interconnect with non-carriers' facilities to facilitate interstate and foreign communications in a manner consistent with that of the past, it might prove necessary to prescribe terms of interstate and foreign service tariffs of entities other than AT&T. But, as competition develops, the present requirement for such tariffs might prove unnecessary.

39. While we believe that Part 68 of our rules will continue to govern exchange carriers, independently of whether they do or do not concur in interstate tariffs which reference or incorporate these rules, we conclude that any potential confusion on this point should be resolved now[23]. We have an appropriate vehicle to do so, namely the exchange access tariffs which will govern participation in interstate and foreign service of all exchange carriers, Independents and BOCs, and which will be subject to our direct jurisdiction. Accordingly, we hereby propose to require that interconnection to non-carrier facilities (i.e., communications systems and terminal equipment) be offered in each exchange access tariff, with an appropriate reference to Part 68 of our rules in each such tariff. As was the case in our discussion of analogous tariff requirements in para. 35 above, we invite comment on how best to implement such a

[23] Furthermore, even currently not all forms of interconnection which have been sanctioned or required by this Commission are prescribed in Part 68 of our rules; forms of interconnection are authorized under the tariffs which are not explicitly addressed in the rules because in certain circumstances it has proven more desirable and flexible to utilize tariffs.

requirement in a manner which minimizes the flow of unnecessary paper.

40. A requirement that interconnection to non-carrier facilities and terminal equipment be offered in exchange access tariffs also will have the effect of addressing several issues concerning the BOCs which arose during the course of the district court's Tunney Act proceeding[24], but which were not explicitly resolved in the MFJ. First, the MFJ as initially proposed would have barred the BOCs from providing terminal equipment. Since they could not do so, it had the effect of ensuring that others' terminal equipment could be interconnected with the BOCs' exchange facilities on a fair basis, else the BOCs could not provide service. But, as ultimately modified during the course of the Tunney Act proceeding, the MFJ now permits the BOCs to supply (but not manufacture) terminal equipment. Specific reference in the BOCs' tariffs to Part 68 of our rules will ensure that they do not discriminate in their treatment of others' terminal equipment as opposed to their own. Second, the MFJ contains provisions which address interconnection of other carriers' facilities and, to some extent, terminal equipment, to exchange facilities. It does not explicitly address interconnection with non-carrier communications systems or facilities. An offering of such interconnection in the BOCs' exchange access tariffs, in accordance with the Commission's decision in *AT&T (ARINC)*, 77 FCC2d 1 (1978) and its decision interpreting the requirements of Part 68 of the rules, *Memorandum Opinion and Order*, 59 FCC2d 83, 86 (1976), will clarify to the public that the BOCs' established obligation to provide such interconnection will continue to be discharged[25][26]. Such a clarification is similarly desirable for subscribers of non-Bell Independent telephone companies.

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[24] Pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. §§ 16(b)-(h) (the "Tunney Act"), the district court examined the public interest ramifications of the settlement agreement between AT&T and the Department of Justice as a prelude to entering the MFJ.

[26] We believe that two related interconnection offerings should also be made, where appropriate, in access tariffs. First, in circumstances addressed in our AT&T (Piece out) and AT&T (ARINC) decisions, supra. n. 6, AT&T itself is obliged to offer interconnection to its facilities. Upon implementation of the MFJ, to the extent that AT&T might discharge this obligation through the use of interposed exchange facilities provided by the BOCs, we believe the latters' access tariffs should offer such interconnection. To the extent that AT&T may be authorized to provide service directly to subscribers' premises, AT&T's own tariffs should offer such interconnection. Second, the status of resellers under the MFJ is unclear. The MFJ establishes specific exchange access requirements for access by interexchange carriers to the BOCs' facilities, but it is unclear whether resellers are to be treated as carriers for this purpose. To the extent that interconnection is to be offered to resellers, we tentatively conclude that such interconnection be offered in the access tariffs. We invite comment on the foregoing proposals.

D. Planning

41. As was noted in the introduction to this Notice, forms of joint action by carriers, in some cases under this Commission's sponsorship, and in many cases by the carriers themselves, have historically proved necessary in telecommunications to achieve important objectives: development of industrywide technical standards, operating principles, administrative procedures and maintenance procedures; informal resolution of service and maintenance disputes which may arise where there is divided responsibility for elements of a joint through service; development of standby procedures and facilities to support extraordinary communications requirements (*e.g.*, NSEP communications); and development of appropriate forecasting and circuit requirements amalgamation procedures to facilitate planning for construction of new facilities with relatively long "lead" times. Because of AT&T's preeminence, many of these activities were performed or sponsored by AT&T, and because of its ownership of the BOCs, AT&T was able to ensure that the results of these activities would be carried out.

42. With divestiture of the BOCs, and the more competitive nature of telecommunications, it is apparent that dominance over such activities by a single firm, AT&T, is neither likely nor desirable. Concerted action by competitors may, if carried too far, be anticompetitive and inimical to the pro-competitive policies of this Commission. However, many forms of planning are not necessarily anticompetitive, and indeed may be desirable. Moreover, the fact is that such planning has proceeded for over a century, and immediate discontuance of all such planning could disrupt the provision of service to the public.

43. We propose below to establish limited joint planning procedures to ensure continued attainment of important efficiency, service, defense, and emergency communications objectives under the Act, but in full awareness of the requirement that such activity not frustrate our pro-competitive policies. We shall carefully consider the competitive implications of any planning which is to be sanctioned, and we make tentative proposals below which, in our view, will ensure that anticompetitive problems will not arise[27].

[27] "It might be noted that Commission sanctioning of joint planning by carriers has been sought in a pending petition by the National Telecommunications and Information Administration which predated the structural industry changes addressed in this Notice, *see*, Petition for Notice of Inquiry and Proposed Rulemaking, Oct. 10, 1980, RM-3781." A basis was shown in that petition for Commission sponsorship of limited joint planning among carriers even in the absence of the major changes now underway, and, as is discussed below, we believe that there is even more of a basis for limited joint planning now. In view of the substantial changes in the predicate for any such planning, we shall merge the record therein with this proceeding.

1. *Basis for Proposing Limited Joint Planning*

44. Limited joint planning among exchange carriers for interconnection arrangements offers several advantages as a means of assisting carriers in meeting interconnection obligations and carrying out the purposes of the Act.[28] Joint planning is an effective means of standardizing equipment and system design and functions at the point of interconnection (but not necessarily the internal design of equipment and facilities). This standardization, and the resulting compatibility among equipment and systems used by different carriers and other users, promotes the efficient operation of the telecommunications system. This efficiency has attendant advantages for subscribers to carrier services. As we previously have noted, planning among carriers also is an important means of securing appropriate standby communications capabilities to serve the NSEP needs of the Nation.[29]

45. The development of competition among long distance carriers raises the possibility that joint planning among exchange carriers for interconnection with the competitive long distance carriers will become increasingly necessary in order to ensure efficient operations. As the number of competing carriers increases, it is possible that the risks of inefficiency also will increase if the various carriers employ incompatible designs and functions for interconnected equipment.[30] It should be noted, however, that any such inefficiencies would diminish (and the need for joint planning consequently could decrease) if technological developments evolve in the direction of telecommunications systems which operate independently, and for which interconnection is neither necessary nor desirable.

46. In the past, AT&T has been the locus of joint planning for interconnection arrangements. AT&T's control of the BOCs, and its working relationships with the Independent telephone companies, has enabled AT&T to initiate and oversee joint planning in a manner which has been sufficient to mitigate any need for this Commission to take an active role in providing structures for this planning. Because of this preeminence AT&T has also largely served as a locus for accommodation by the traditional telephone carriers of the needs of other carriers as well (*e.g.*, specialized carriers, record carriers). AT&T's role, however, necessarily will be altered by the divestiture to be carried out in accordance with the MFJ.[31] Although the long-term effects of the divestiture on joint planning cannot be assessed

[28] These interconnection obligations have been addressed in the previous sections of this Notice.

[29] See para. 18, *supra*.

[30] *See* Lavey, *Joint Network Planning in the Telephone Industry*, 34 Fed. Comm. L.J. 345, 348 (1982) (hereinafter cited as Lavey).

[31] See para. 16 *supra*.

with certainty, it is reasonable to conclude that short-term dislocations are likely to occur if joint planning is disrupted during the period following divestiture. Further, since AT&T is proposing that the divestiture be effected on January 1, 1984,[32] there may not be sufficient time for carriers to work out planning arrangements to replace the existing structure, in the absence of action by this Commission.

47. Although there are benefits to be gained from joint planning for interconnection arrangements, it should be recognized that joint planning poses two sets of potential risks. Product and service innovation generally can be expected as a by-product of competition,[33] and innovation usually results in benefits to the public in the form of quality improvements and cost reductions. If, however, joint planning for interconnection results in excessive standardization of design and operational specifications at the point of interconnection, then this very success could have a dampening effect on innovation. As connectivity tolerances are narrowed through standardization, design and operational variations which would result from innovation could become dysfunctional. Thus, the incentives for innovation could diminish to the extent that carriers and equipment vendors opted to take advantage of the benefits of standardization.[34] It must

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[32] Plan of Reorganization of AT&T in United States v. AT&T at 5 (D.D.C., filed Dec. 16, 1982) (hereinafter cited as Plan of Reorganization). In any event, the divestiture must take place not later than February 24, 1984, in accordance with Section I.A of the MFJ. *See also*, n. 12 *supra*. relating to FCC approval.

[33] *See* Specialized Common Carrier Services, 24 FCC 2d 318, 333 (1970). It has been noted, as a general matter, that "freedom of entry and competition [serve] as a device for innovation—for encouraging the development of new and different services and for assuring the optimal development and exploitation of new technology." 2 A. Kahn, *The Economics of Regulation: Principles and Institutions* 149 (1971) (footnote omitted). It also has been argued that this general principle applies in the communications industry:

> [T]here are concrete evidences of the contribution competitive innovation can make in communications where it has had an opportunity to work . . . . The revolutionary development in the last decade of microwave and satellite communications, the burgeoning of user-owned attachments and in particular those associated with the use of shared computer facilities . . . have . . . been vigorously pressed not only by large users and independent entrepreneurs in communications but also, at least with equal vigor, by competing manufacturers of equipment.

Id. at 304 (footnote omitted).

[34] This Commission has taken notice of this disadvantage of central planning in a different context:

> Implicit in the central planning approach to designing and engineering the telephone network is the assumption that the planners know what is best for the customers. However, in the present era of rapid technological change and computerization of communications functions, it is difficult if not impossible for a centralized planning system to detect and respond to the many diverse needs of customers who continually seek to make more efficient use of the telecomunications system.

be stressed, however, that the joint planning we are proposing involves the achievement of standardization and compatibility *only* at the point of interconnection. Innovation in overall system design and operation, which would be fostered by competition among long distance carriers and among equipment vendors, should not be seriously affected by this limited form of standardization in most cases. However, there might be circumstances in which a particular innovation (*e.g.*, digitized voice transmission at less than 64 kbits/sec) might be adversely affected by a standard which did not accommodate that innovation. We are interested in comments on how best to balance this potential effect in formulating our approaches herein.

48. A second set of potential risks posed by joint planning involves the possibility of abuse of the joint planning mechanism. Various types of anticompetitive practices—including price-fixing, market and capacity allocation, exclusionary standard-setting—can be germinated through joint planning activities. The rules proposed here will seek to confront these potential abuses and establish requirements and constraints intended to prevent them from occurring.[35]

49. A decision regarding the efficacy of joint planning for interconnection involves a balancing of the advantages and risks which we have outlined. It is our tentative conclusion that the advantages to be gained from joint planning, as well as the short-term dangers posed by disruptions in this planning, outweigh the potential risks involved and point toward a conclusion that joint planning under the aegis of this Commission will serve the public interest.

2. *Authority of Commission To Require Limited Joint Planning*

50. Federal agencies, in the absence of specific statutory prohibitions, have authority to require concerted action on the part of private entities subject to their regulatory authority if this concerted action is necessary or appropriate to further the statutorily established goals and functions of the agencies. Such authority, in fact, has been exercised by this Commission in this proceeding.[36] Section

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Economic Implications and Interrelationships Arising From Policies and Practices Relating to Customer Interconnection, Jurisdictional Separations, and Rate Structures (Docket No. 20003), 75 FCC 2d 506, 547 (1980) (discussing the appropriateness of integrated control and planning regarding specialized private line services).

[35] See para. 59, *infra*.

[36] Third Report at paras. 339–44 (establishment of an intra-industry association to carry out tariff filing and pool distribution functions under the access charge system). We have rejected the notion that we lack authority to provide for the establishment of a private association which would engage in joint actions. Third Report at para. 343. We have noted, in addressing the issue of joint planning in an earlier phase of this proceeding, that we have sufficient authority to require

222 of the Act, as amended by RCCA, provides a recent example of the imposition of negotiation requirements upon carriers.[37] Negotiations to arrive at the Docket No. 20099 Settlement Agreement and thereafter[38] and the ENFIA negotiations[39] are further examples of carrier negotiations conducted under our aegis.

51. There is ample authority in the Act to support the establishment of joint planning requirements by this Commission. Section 1 of the Act, 47 U.S.C. § 151, provides that this Commission was established "[f]or the purpose of . . . [making] available . . . to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges . . . ." Since we perceive the goal of joint planning for interconnection to be the promotion of efficiency, with the resulting provision of adequate facilities at reasonable charges, we conclude that a rulemaking to provide for joint planning is within our statutory authority. A further basis for Commission action is found in Section 201(a) of the Act, 47 U.S.C. § 201(a), which requires carriers to furnish service upon reasonable request, to establish physical connections with other carriers, and to establish through routes. Joint planning for interconnection arrangements can be viewed as an appropriate means for enabling carriers to comply with these requirements of Section 201(a). Section 201(b) of the Act, 47 U.S.C. § 201(b), requires all carrier practices relating to the provision of service and the establishment of physical connec-

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exchange carriers "to acquire facilities and to adopt design criteria that will make interconnection effective." MTS and WATS Market Structure, Report and Third Supplemental Notice of Inquiry and Proposed Rulemaking, 81 FCC 2d 177, 207 (1980).

[37] Section 222(c)(3)(A) of the Act, 47 U.S.C. § 222(c)(3)(A), required this Commission to convene meetings of IRCs for purposes of negotiating an interconnection agreement.

[38] Paragraph 16 of the Settlement Agreement provided as follows:

> 16. The parties agree that on the second Monday of each month after the effective date of this Settlement Agreement, or on such other day as the parties may from time to time determine, they shall meet under the aegis of the Commission's Common Carrier Bureau to review the progress made in implementing this agreement. In addition, subcommittee meetings between Bell System company and OCC representatives will be held during the Interim Period with respect to technical, engineering, maintenance and test procedures.

American Telephone & Telegraph Co., (Offer of Facilities for Use by Other Common Carriers), 52 FCC 2d 727, 742 (1975). The parties conducted meetings over a period of approximately 15 months and reached agreement regarding principles of interconnection, organization, operations, administrative matters, interconnection facilities and arrangements, and other matters, and pursuant to the settlement agreement and the Commission's acceptance, they have done so on a continuing basis since. *See also*, Interconnection Between Wireline Telephone Carriers and Radio Common Carriers Engaged in the Provision of Domestic Public Land Mobile Radio Service under Part 21 of the Commission's Rules, 63 FCC 2d 87, 89 (1977).

[39] Exchange Network Facilities for Interstate Access (ENFIA), 71 FCC 2d 440 (1979).

tions and through routes to be just and reasonable. Furthermore, certain communications facilities require authorization by this Commission under the provisions of Section 214(a) of the Act, 47 U.S.C. § 214(a). Limited joint planning by carriers under our aegis has proven useful as a means of aiding us in carrying out our responsibilities under Section 214(a). Moreover, Section 214(d) of the Act, 47 U.S.C. § 214(d), authorizes this Commission to require any carrier "to provide itself with adequate facilities for the expeditious and efficient performance of its service as a common carrier . . . ." It is our view that this Commission can further the goals expressed in Section 214(d) by establishing joint planning procedures.[40] Also, Section 218 of the Act, 47 U.S.C. § 218, mandates that we be informed of the manner in which service is rendered; planning under our sponsorship is an appropriate mechanism to discharge this Section 218 mandate. Further, Section 4(i) of the Act, 47 U.S.C. § 154(i), grants this Commission broad authority to carry out its responsibilities under the Act.[41] We conclude that the establishment of joint planning procedures by this Commission falls within the ambit of the authority established in Section 4(i) of the Act. Finally, we believe that the flexibility accorded us in ordering our procedures under Section 4(j) of the Act, 47 U.S.C. § 154(j), permits us to sponsor activity of this nature to carry out the express goals of the Act. We conclude that limited joint planning is, as constrained below, an appropriate mechanism for ensuring the just and reasonable administration of interconnection arrangements.

3. *Structure for Limited Joint Planning*

52. It is our tentative belief that the carrier association established by the Third Report[42] affords an appropriate structure for limited joint planning. The Third Report found that a carrier association is necessary to prepare and file joint tariffs and to administer distributions from a joint revenue pool because AT&T cannot be called upon to perform such a role in the post-divestiture environment. The Third Report further found that action by this Commission to mandate creation of the association is necessary because there is not sufficient time to permit institutional arrangements among carriers for these purposes to develop spontaneously. Under the framework established in the Third Report, the association will be comprised only of exchange carriers participating in

[40] Consistent with these mandates, under Sections 214(a) and 214(d), we have sponsored facilities planning by United States international carriers and have accommodated the views of their foreign correspondents through a related consultative process.

[41] Section 4(i) of the Act, 47 U.S.C. § 154(i), provides that "[t]he Commission may perform any and all acts . . . as may be necessary in the execution of its functions."

[42] See note 36, *supra*.

access charge revenue pools administered by the association. This Commission subsequently will adopt a supplemental order establishing membership rules providing for appropriate representation of different classes of exchange carriers.[43] The association is barred from engaging in any activity not related to the preparation or filing of access charge tariffs or the collection and distribution of access charge revenues, unless the additional activity is approved by this Commission.

53. We tentatively conclude that the association established by the Third Report is a readily available mechanism for joint planning, and that there is no need to establish some form of parallel organization the membership of which would overlap extensively with the membership of the established association. The association already will be involved with access issues as a result of the functions assigned to it by the Third Report, and it thus becomes logical to extend these functions to include the administrative, technical, and operational aspects of interconnection planning which are involved in this Notice. We propose to impose procedural requirements and guidelines which will have application only in the context of the joint planning activities of the association and not in the context of other activities carried out in accordance with the Third Report, but it is our preliminary belief that this bifurcated approach to the operational rules of the association should not hamper its ability to carry out any of the functions assigned to it. Further, the fact that the association will be performing tariff preparation and revenue collection and distribution functions in addition to the joint planning functions we are here proposing will not, in our preliminary view, increase the potential for the development of anticompetitive practices to which we previously alluded.[44] In this respect it should be emphasized that the interexchange carriers which are in direct competition will not be members of the association. Their projections and other information will be considered by the association for planning purposes, but, as is discussed below, we propose to prohibit such information from being disseminated except in amalgamated form.

54. We tentatively have concluded that the membership of the association, as established in the Third Report, is suitable for the joint planning functions which we envision. It is our preliminary belief that it is appropriate to exclude representatives of this Commission, representatives of State public utility commissions, members of the general public, and interexchange carriers from membership on the association for joint planning purposes. However, as will be discussed subsequently,[45] it is our tentative belief

[43] See Third Report at para. 346.

[44] See para. 48, *supra*.

[45] See paras. 61, 62, and 64, *infra*.

that this Commission should be assigned responsibilities and functions regarding the joint planning activities of the association which are designed to ensure that the association does not operate in a manner which frustrates the goals and policies which we are establishing. This result can be achieved without requiring that this Commission be given membership on the association. A main objective of our proposals is to ensure the continuation of joint planning activities regarding interconnection which presently are being carried out on an informal basis, largely through the efforts and under the auspices of AT&T, but which may be seriously disrupted in the post-divestiture period if we do not act to establish a structure for planning. We are preliminarily satisfied with the assumption that this continuity can be achieved without carving out a direct role for this Commission in the planning functions of the association. It does not seem to us to be appropriate to propose that this Commission should take an active policymaking or management role in the planning negotiations of the association—such a role appears to be unnecessary and would constitute a departure from the manner in which joint planning historically has been carried out.[46]

55. As to representation of State public utility commissions and the general public on the association for joint planning purposes, we tentatively reiterate our finding in the Third Report that the interests of the State commissions and the public are amply protected by safeguards already established in the Act.[47] With respect to public representation, it is our further view that the technical nature of the interconnection planning deliberations to be conducted by the association are such that a direct decision-making role for representatives of the general public does not seem apt. Membership for interexchange carriers on the association for joint planning purposes, in our tentative view, would pose special problems sufficient to warrant the conclusion that interexchange carriers should be excluded from membership. At least for the foreseeable future, local exchange service and exchange access will

[46] This Commission has taken a similar approach regarding the general area of network planning:

> [P]lanning of the nationwide network has been and remains today primarily a private activity. While . . . we intend to monitor the network to ensure it is not designed in a manner that forecloses entry, technical and design disputes among the different entities who comprise the network largely have been resolved without Commission intervention.

In re Applications of Winter Park Tel. Co. and Orange City Tel. Co., 84 FCC 2d 689, 696 (1981).

[47] Third Report at para. 345 (citing Fourth Supplemental Notice of Inquiry and Proposed Rulemaking, 90 FCC 2d 135, 150 (1982)).

be provided by exchange carriers which are regulated monopolies in their service areas.[48] This fact in itself lends credence to the argument that an association of local carriers for joint planning purposes will not pose serious anticompetitive risks. Stated another way, anticompetitive conduct by local carriers will increase in likelihood only as competitive forces are sought to be introduced in the local exchange and local access markets. The situation with respect to interexchange carriers, however, is different. The interexchange market is increasingly becoming subject to competition.[49] Interexchange carriers operating in a competitive environment might sieze upon their membership on the association as a device for effecting exclusionary and other anticompetitive interconnection practices. Since interexchange carriers obviously are affected by interconnection planning, it is important that they be allowed to play some role in this planning.[50] It is our preliminary belief, however, that this role should stop short of membership on the association.[51]

56. We seek comments on the following issues regarding the structure for joint planning arrangements and our proposal thereupon set out in this section. First, should a framework other than the association established by the Third Report be utilized for this joint planning? Are there alternative existing structures which could be better utilized for this purpose? Would it be more appropriate to establish a new organization for the exclusive purpose of engaging in joint planning for interconnection arrangements? Second, if the association established by the Third Report is used for this joint planning, should we modify our tentative conclusions regarding representation of State public utility commissions, the general public, and interexchange carriers as members of the association? We also request comments regarding whether other groups should be represented as members of the association for joint planning purposes, or, in the alternative, whether and how others might best participate in the planning process, but short of actual membership.

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[48] *See* Majority Staff of Subcomm. on Telecommunications, Consumer Protection, and Finance of House Comm. on Energy and Commerce, *Telecommunications in Transition: The Status of Competition in the Telecommunications Industry*, 97th Cong., 1st Sess. 228 (1981).

[49] United States v. AT&T, 552 F. Supp. at 171. In 1980, revenues earned by specialized common carriers constituted 1.3 percent of the toll service revenues of the telephone industry, and their plant had 0.5 percent of the value of the gross communications plant of the telephone industry. Lavey, *supra* note 30, at 367.

[50] See para. 63, *infra*, for a discussion of our tentative conclusions regarding the nature of this role.

[51] We recognize, however, that certain larger Independent telephone companies will perform the dual role of being exchange and interexchange service providers. In present circumstances, however, they would not appear to have sufficient market power to change our belief that the proposed structure is appropriate. Parties may wish to comment on this.

Finally, we would like the parties to comment upon whether we should modify our tentative conclusion regarding membership of this Commission on the association with respect to its planning activities.

4. *Functions of Association*[52]

57. It is our preliminary belief that the joint planning functions of the association should be grouped into three areas. First, the association should conduct advance planning regarding administration of interconnection procedures, technical standards for the provision of interconnection, design and operational standards relating to interconnection equipment and systems, and related administrative and maintenance procedures. The primary purposes of this planning should be to make adjustments to interconnection processes on an ongoing basis in order to achieve operational efficiency, to promote nationwide compatibility, and to anticipate future needs and problems so that adjustments can be planned and carried out on the basis of these projections. It should be stressed that it is our tentative conclusion that these functions of the association should be limited to the point of interconnection. Interexchange network design and planning will be beyond the scope of the association's activities. Second, it is our tentative view that the association should be involved in the collection of information to be used in connection with short- and long-term forecasting regarding patterns of interconnection demand and construction needs. Necessary exchange facilities to meet interexchange carriers' needs often require long periods for construction and deployment. The efficiency with which exchange carriers are able to provide interconnection services is in some measure dependent upon the carriers' accuracy in assessing trends in the level and nature of demand for these services. The rapid pace of technological developments in this field, and the impact of these developments on interconnection demand, places a premium upon the need for effective forecasting. It is our preliminary belief that the effectiveness of this forecasting can be maximized if it is performed on a central basis.

58. The structure of the association would enable it to collect and collate data from exchange carriers, to review and analyze this information, and to arrive at planning decisions based upon these analyses. It is our tentative view that the association should develop alternative plans for responding to projected demand, study these options in order to select the most appropriate plan, and carry out reviews of the implementation of the selected plan. In this way, interconnection procedures and standards would be responsive to

[52] For the convenience of discussion, our subsequent comments make reference to the "association" based upon our tentative conclusion that the association created by the Third Report is the proper structure for interconnection planning. These references, however, should not be construed to preclude designation of one or more different entities to carry out these planning functions.

changing needs. However, we propose to restrict dissemination to interexchange carriers of forecasing information except in amalgamated form in order to ensure that the projections themselves do not become a mechanism for impermissible concerted action by the competitive interexchange carriers.[53] Third, it is our preliminary view that NSEP planning functions could be carried out by the association.[54] Concern has arisen over a claim that the divestiture, and the attendant changes in AT&T's emergency planning role,[55] could result in the disruption of telecommunications functions which are deemed critical to the Nation's defense and emergency communications capabilities.[56] Although the MFJ requires the BOCs to establish a point of contact for NSEP purposes,[57] it is our tentative

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[53] *See, e.g.*, Maple Flooring Manufacturers Ass'n v. United States, 268 U.S. 563 (1925); United States v. American Linseed Oil Co., 262 U.S. 371 (1923); American Column & Lumber Co. v. United States, 257 U.S. 377 (1921).

[54] The important role played by communications carriers in connection with NSEP often has been recognized. *See* Section 1 of the Act, 47 U.S.C. § 151; Section I.B of the MFJ; H.R. Rep. No. 1252, pt. 1, 96th Cong., 2d Sess. 90 (report on H.R. 6121, Telecommunications Act of 1980) ("It is important and valuable to the Nation that carrier networks be interconnected (or capable of interconnection) and capable of interoperation in emergencies . . . ."); S. Rep. No. 170, 97th Cong., 1st Sess. 52 (1981) (report on S. 898, Telecommunications Competition and Deregulation Act of 1981).

[55] For an example of the role AT&T has played in meeting national defense needs, see Bell Telephone Laboratories, Inc., *A History of Engineering and Science in the Bell System* 232–38 (1978).

[56] *See, e.g.*, In the Matter of MTS and WATS Market Structure, Report and Third Supplemental Notice of Inquiry and Proposed Rulemaking, 81 FCC 2d 177, 206–07 (1980). After divestiture an AT&T government communications organization will act as the point of contact between AT&T and the government for NSEP purposes, including NSEP technical standards, NSEP network planning, and all other aspects of AT&T's role (as an interstate regulated entity) in nationwide NSEP planning or exercises. AT&T has indicated that:

> AT&T will retain its network operations center and established NSEP relocation sites, which will continue to perform, among other things, NSEP alerting services with respect to AT&T's network and interconnected carrier networks, if those carriers and the government so desire.

Consolidated Application of American Telephone & Telegraph Company and Specified Bell System Companies, In the Matter of AT&T (Consolidated Applications), No. W-P-C-4955, at 74 (FCC, filed March 1, 1983).

[57] Section I.B of the MFJ requires a BOC single point of contact for NSEP purposes. Under the Plan of Reorganization submitted by AT&T, the BOCs will establish a specialized government communications group within the Central Staff Organization in order to comply with this MFJ requirement. The functions of this group will include (1) the development of technical standards for use by the BOCs; (2) operation as a single point of contact for alerting BOCs in emergency situations; and (3) cooperation "with AT&T and its affiliates and other carriers to effectuate NSEP communications requirements . . . ." Plan of Reorganization, *supra* note 32, at 418.

The Plan of Reorganization describes the manner in which the communications group will coordinate with interexchange carriers and other vendors in the

view that the MFJ requirements should be supplemented, to the extent necessary or desirable, by a limited planning process involving all exchange carriers, to minimize disruptions in emergency communications by all involved sectors of the industry.

59. Furthermore, we propose that explicit restrictions be placed upon the functions of the association in order to eliminate any potential anticompetitive problems which might be an outgrowth of the association's activities. The Third Report achieves this result in a general sense by barring any additional activities by the association unless these activities have been approved by this Commission.[58] It is our preliminary conclusion that the rules of this Commission also should specify that the association may not, in connection with the

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following terms:

> [T]he BOCs and the centralized government communications group will cooperate fully with the interexchange carriers and equipment vendors involved to provide efficient service. Specifically, the centralized group will, if the government desires, serve as a point of contact for other carriers and vendors to arrange for the installation, joint testing, maintenance, restoration, repair and all other operational aspects of BOC-provided NSEP services that are interconnected with services provided by other carriers.

Id. at 421. It should be noted that the arrangements described in the Plan of Reorganization do not appear to include coordinated planning and do not appear to involve Independent telephone companies. *See* Comments of United States Independent Telephone Association on the Plan of Reorganization, at 4 (D.D.C., filed Feb. 16. 1983).

AT&T, in materials filed with this Commission subsequent to the filing of the Plan of Reorganization with the District Court of the United States for the District of Columbia, has alluded to the possibility of coordinated planning between the BOCs and other carriers for NSEP purposes.

> [T]he CSO [the central staff organization for the BOCs] would, if requested by the government, act as the point of contract for other carriers to coordinate the installation, joint testing, maintenance, restoration, repair, and all other operational aspects of BOC-provided intraLATA NSEP services that are interconnected with services provided by other carriers and terminal equipment vendors. To effect this coordination, it is assumed that the involved carriers, including the independent telephone companies, would designate NSEP coordinators and would be in communication with CSO's national alert center. Neither the BOCs nor the government communications groups in the CSO will select interexchange carriers or terminal equipment vendors for the government.

Consolidated Application of American Telephone Telegraph Company and Specified Bell System Companies, In the matter of AT&T (Consolidated Applications), No. W-P-C-4955 at 78 (FCC, filed March 1, 1983). The Department of Justice had indicated to the district court that it would require the Plan of Reorganization to be amended to clarify that the central staff organization will have authority to "require" that the BOCs carry out NSEP activities on a coordinated basis, and that the central staff organization wouldbill and collect from federal agencies on a centralized basis. These changes have been accepted.

[58] Third Report at para. 344.

planning activities addressed in this Notice, collect or share any information relating to pricing[59] or procurement,[60] and that the association may not take any action which is intended to allocate, or has the effect of allocating, any markets or facilities. These rules should provide that information which the association is authorized to collect and collate may be disseminated to interexchange carriers only in amalgamated form in order to prevent any possibility of anticompetitive collusion by these carriers. Further, these rules should require that interconnection standards and procedures must be established by the association on an objective basis, so that the standards and procedures do not amount to anticompetitive devices for excluding potential competitors.[61]

60. With respect to the functions of the association, we request the parties to comment on the nature and scope of the functions which we have outlined, with particular attention to whether these functions are necessary or appropriate functions for the association to perform. We also seek comment regarding whether other functions should be assigned to the association, either in lieu of or in addition to the functions we have outlined. We further would like the parties to comment on the limitations we tentatively have

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[59] The exchange carrier association is necessarily involved in the collection and sharing of pricing information in connection with its preparation of access tariffs. Third Report at para. 348. The pricing restrictions we propose to establish here relate exclusively to the planning activities of the association and would in no way constrain or impair the functions established in the Third Report.

[60] We recognize that the functions of the association in establishing technical interconnection standards, see para. 57, *supra*, may pose the risk that technical standards might be adopted which indirectly lead to creation of procurement guidelines. That is, technical standards could be fashioned in a way that would tend to favor the facilities and equipment of certain vendors. However, our goal is to delineate the functions of the association and restrictions applicable to its activities in a manner which minimizes this risk, while maintaining the potentially desirable goal of permitting operational problems to be avoided through the use of appropriate technical standards. We seek comments regarding possible ways in which reconciliation of these goals may appropriately be achieved.

[61] The Supreme Court, in holding that an industry standard-setting organization is civilly liable under antitrust law for antitrust violations of its agents acting with apparent authority, noted that:

> [A] standard-setting organization like ASME can be rife with opportunities for anticompetitive activity. Many of ASME's officials are associated with members of the industries regulated by ASME's codes . . . . [S]ome may well view their positions with ASME, at least in part, as an opportunity to benefit their employers. When the great influence of ASME's reputation is placed at their disposal, the less altruistic of ASME's agents have an opportunity to harm their employers' competitors through manipulation of ASME's codes.

American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp., 50 U.S.L.W. 4512, 4516 (U.S. May 17, 1982) (footnote omitted). *See*, Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1961) for a discussion of the unlawfulness of exclusionary standard-setting.

decided to place upon the activities of the association. Again, we seek comment regarding whether these limitations are necessary or appropriate and regarding whether other limitations should be established. Finally, we request comments regarding the nature of the relationship, if any, which should be established between the association, the BOC point of contact for NSEP purposes to be created under the MFJ, and other carriers' administrative elements with NSEP communications responsibilities. In this regard, we seek comments on the following questions: What should be the nature and extent of coordination between these entities? Should any such entity have any "veto" authority over the decisions of the others?

5. *Procedures of Association*

61. It is our tentative view that procedures applicable to the operation of the association should serve three primary objectives. First, the public should be given ample opportunity to observe the processes of the association and to examine the decisions and other actions of the association. Second, this Commission should reserve sufficient authority to oversee the operations of the association in order to ensure that actions taken by the association are consistent with the policies of the Act and any rules we may adopt herein. And third, sufficient flexibility should be incorporated in the procedures of the association to enable it to carry out its planning functions efficiently and effectively. It should be noted that the procedures which we tentatively are proposing, in seeking to meet these and other objectives herein, have been drawn in large measure from provisions contained in Section 708 of the Defense Production Act of 1950, 50 U.S.C. App. § 2158, which addresses analogous issues.

62. We propose that the association be governed by bylaws submitted to, and approved by, this Commission. We propose that the chairman of the association be selected from among its membership and serve for a term to be fixed by the members in the bylaws of the association. Meetings for planning purposes will be held at the call of the chairman or upon the request of a majority of the membership, and reasonable public advance notice of meetings must be given by the association. The association will have the discretion to establish permanent or ad hoc subcommittees to be responsible for various aspects of the association's planning activities. This Commission will have authority to monitor the activities of the association by sending an official representative to its meetings. The Commission representative will have authority to require the association to terminate any particular proceeding if he concludes that actions taken in the proceeding, or the manner in which the proceeding is being conducted, violate the Act or the rules established by this Commission. We propose that the representive may exercise this authority without being required to obtain any further approval from the Commission. If the representative terminates a meeting,

then the association may not reconvene to discuss the topic which caused such termination without the express prior approval of the Commission.[62] Meetings of the association will be open to the public, unless the association determines (by majority vote of those members of the association who are present) that matters to be discussed at the meeting are within the purview of matters described in paragraph (1), (3), or (4) of subsection (b) of Section 552 of Title 5, United States Code.[63] The association will be required to keep minutes of its meetings. These minutes must be filed with this Commission and made available for public inspection, except that information in the minutes pertaining to matters described in paragraph (1), (3), or (4) of subsection (b) of Section 552 of Title 5, United States Code, would not have to be disclosed to the public.[64]

63. The procedures we are proposing also would require the association to permit interexchange carriers (including voice and data communications carriers) and other users of exchange access facilities to make written and oral presentations to the association regarding interconnection planning matters under consideration by the association.[65] The rules we are proposing will not specify the extent to which the association must take these presentations into account in arriving at planning decisions, but we note that it is not our intent that participation by interexchange carriers and other users force the deliberations of the association to take on the strictures of an adversary proceeding. Rather, it is our tentative view that these carriers and other users will be in a position to assist the association, and to affect the decisions of the association in a positive way, through the provision of information and comments to the association. It is our opinion that, by barring interexchange carriers

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[62] See Section 708(d) of the Defense Production Act of 1950, 50 U.S.C. App. § 2158(d).

[63] See Section 708(e)(3)(D) of the Defense Production Act of 1950, 50 U.S.C. App. § 2158(e)(3)(D). Paragraph (1) of subsection (b) of Section 552 of Title 5, United States Code, relates to information classified as nonpublic under Executive orders; paragraph (3) relates to information which is exempted from disclosure by statute; and paragraph (4) relates to trade secrets and commercial or financial information which is privileged or confidential. It should be noted that the exclusions established in Section 708(e)(3)(D) of the Defense Production Act of 1950 embrace only the information described in paragraphs (1) and (3).

[64] See Section 708(d) of the Defense Production Act of 1950, 50 U.S.C. App. § 2158(d).

[65] This Commission, in discussing the overall network planning process, has noted that:

> [T]he public is well served when . . . users and constituents of the network also are involved in the planning process. Joint planning introduces more directly the perspective and experience of other responsible entities, bringing to light viewpoints that might otherwise go unnoticed. We expect that a broader planning perspective will lead to the consideration of alternative plans and ultimate improvement of the network.

In re Applications of Winter Park Tel. Co. and Orange City Tel. Co., 84 FCC 2d 689, 697 (1981).

and other users from playing an active role in the decision-making of the association, the proposed rules will mitigate the types of anticompetitive problems we previously have discussed.[66] Furthermore, it would appear that equipment manufacturers would have an interest in, and the ability to contribute to, deliberations concerning technical standards. Thus, we would propose that such entities also have the right to make presentations to the association with respect to standards.

64. The proposed rules also would require the association to disseminate information regarding its interconnection decisions and policies in a manner which is sufficient to keep the industry and the public adequately informed of association actions.[67] Further, we propose that the association be required to file planning decisions and related information with this Commission.[68]

65. We request parties to comment generally regarding the procedural requirements we are proposing, and we would like the parties to suggest additional or alternative procedural requirements. We also seek comments regarding the following specific issues: First, is the role we have outlined for this Commission appropriate, or should it be modified? Should the Commission role be narrowed (*e.g.*, by eliminating the monitoring function)? Or should the Commission role be expanded (*e.g.*, by making a Commission representative a member of the association, by authorizing this Commission to screen interconnection planning topics in advance of meetings, or by barring planning decisions from taking effect unless they specifically are approved by this Commission)? Second, should the proposed rules require this Commission to oversee the implementation of association decisions after they have been made? This Commission has general authority under the Act to prohibit interconnection policies and actions which are not consistent with the Act, but we request comments regarding whether the proposed rules should formalize this function of this Commission by setting up specific monitoring procedures and requirements. Third, should modifications be made in the role established for interexchange carriers, other users of exchange access facilities, and equipment manufacturers, under the proposed rules? For example, should these interests be given any decision-making authority regarding the planning activities of the association?[69] Should these interests be permitted to propose or to

[66] See para. 48, *supra*.

[67] It is useful to note that section II.B.2 of the MFJ requires the BOCs to establish and disseminate "technical information and . . . interconnection standards."

[68] See Section 708(e)(3)(F) of the Defense Production Act of 1950, 50 U.S.C. App. § 2158(e)(3)(F). It should be noted that, in the area of telecommunications network planning, requirements have not been established for the systematic filing of planning decisions. Lavey, *supra* note 30, at 346.

[69] See para. 56, *supra*, for a discussion of whether interexchange carriers should be represented as members of the association.

initiate planning topics for consideration and action by the association, or should their role be limited to commenting upon planning activities initiated by the association?

66. Fourth, should the role of the general public in the proceedings of the association be expanded, with due regard to procedures to accommodate classified information (*e.g.*, by permitting members of the public to make oral or written presentations, or both)? Or should the public role be restricted (*e.g.*, by barring public attendance at association proceedings)? Fifth, we invite comment regarding whether the proposed rules should address informal planning contacts and other arrangements among exchange carriers. Up to this point, our discussion has focused on more formal carrier arrangements for interconnection planning through the association established in the Third Report and through subcommittees which may be established for planning purposes by the association. We note, however, that exchange carriers engage in a variety of informal contacts relating to interconnection planning,[70] and it is appropriate to conclude that these contacts may make important contributions to the efficiency of interconnection planning. We are interested in receiving the views of the parties regarding whether it is appropriate for the proposed rules to be applicable to these informal contacts and, if so, the nature of procedures and requirements which would have the most utility in this informal setting. In this regard, we should note our particular concern that these informal contacts should not become a vehicle through which competing interexchange carriers obtain information which may be used in connection with their competitive activities. Finally, we seek comments regarding the proposed requirement that minutes of association meetings be kept and filed with this Commission. Specifically, would such a requirement prove to be an undue constraint upon planning negotiations? Or should the requirement be strengthened (*e.g.*, by requiring transcripts, rather than minutes) as a means of further ensuring against anticompetitive activities?

6. *Antitrust Considerations*

67. It is our conclusion that the interconnection planning activities and the organizational structure for this planning which we are proposing in this Notice are consistent with the antitrust laws. The Third Report, in fact, already has rejected arguments that the access charge functions of the association pose antitrust problems, noting that "[t]he Sherman Act does not prohibit concerted

[70] *Cf. Hearings on S. 898 Before the Senate Comm. on Commerce, Science, and Transportation*, 97th Cong., 1st Sess. 445 (1981) (testimony of T. Brophy, Chairman and Chief Executive Officer, GTE Corp.) (informal contacts among telephone companies regarding planning for toll switching and transmission facilities), *cited in* Lavey, *supra* note 30, at 378 n.126.

activities, it merely prohibits concerted activities that are likely to produce an unreasonable restraint of trade."[71] It has been our intent in fashioning our proposals herein to assign to the association functions which are important for the provision of efficient planning but which will not create a basis for anticompetitive conduct. We also have proposed restrictions upon association activities as a means of protecting competition.[72] Finally, we have proposed procedural requirements which will act as a further bar against anticompetitive activities. It also should be noted that, although it is true that competition is an important factor which should be given weight in the administration of the Act,[73] this Commission also is required by the public interest standards of the Act to consider factors other than competition, such as the efficiency of the communications network, the provision of reliable service to the public, and the future needs of carriers and users.[74] In sum, we believe that we have sufficient authority under the Act to sponsor procedures as outlined, and that use of such procedures would not raise antitrust issues. Of course, in formulating final rules and requirements herein, we will give weight to the views of the Attorney General of the United States regarding any aspects of the association's activities which may have anticompetitive effects.

IV. *Regulatory Flexibility Act Analysis*

68. We have found at an earlier stage of this proceeding that the Regulatory Flexibility Act is not applicable to this proceeding because no local exchange carrier falls within the definition of "small entity" for purposes of that Act. Third Report at paras. 358–62. We noted in the Third Report, however, that the policy objectives of the Regulatory Flexibility Act are also encompassed in Sections 2(b) and 203(a) of the Communications Act of 1934, the provisions of which are intended to relieve many small telephone companies from various reporting and other requirements established in the Commu-

[71] Third Report at para. 333.

[72] *See* para. 59, *supra*.

[73] FCC v. RCA Communications, Inc., 346 U.S. 86, 94 (1953). The Court also noted, in the *RCA* case, that "encouragement of competition as such has not been considered the single or controlling reliance for safeguarding the public interest." *Id.* at 93 (footnote omitted).

[74] Phonetele, Inc. v. American Tel. & Tel. Co., 664 F.2d 716, 722 (9th Cir. 1981), *cert. denied*, 51 U.S.L.W. 3533 (U.S. Jan. 17, 1983) (No. 81–2359). We do not find it necessary here to address the question of whether the planning requirements which would be imposed upon exchange carriers under our proposed rules would have the effect of establishing any antitrust immunity for such carriers, although we do note the general principle that "[a]ctivities which come under the jurisdiction of a regulatory agency nevertheless may be subject to scrutiny under the antitrust statutes." Jarvis, Inc. v. American Tel. & Tel. Co., 481 F. Supp. 120, 123 (D.D.C. 1978) (citing Otter Tail Power Co. v. United States, 410 U.S. 366, 372 (1973)).

nications Act. Any recordkeeping and other requirements (*e.g.*, tariff requirements) imposed by any final decision in this proceeding would be applicable to all exchange telephone companies, regardless of their size. See paras. 27–40, *supra*, for a detailed discussion of the proposed requirements. However, it is important to note that in fashioning these proposals, we have been cognizant of the differences in resources available to the BOCs and the larger Independent telephone companies, on the one hand, and the smaller Independents, on the other, and we have sought to tailor our proposed requirements to accommodate the limited resources of the smaller companies. We specifically request small Independent telephone companies, their trade associations and others which may represent their interests, to comment on the implications of these requirements in the light of their operations, and to propose appropriate administrative mechanisms which will minimize the flow of unnecessary paperwork.

V. *Ordering Clauses*

69. IT IS HEREBY ORDERED, pursuant to Sections 1, 4(i), 4(j), 201–205, 214, 218 and 403 of the Communications Act of 1934, and 5 U.S.C. § 553, That NOTICE IS HEREBY GIVEN OF THE PROPOSED ADOPTION OF RULES IN PART 69 OF TITLE 47 OF THE CODE OF FEDERAL REGULATIONS, in accordance with the discussion and delineation of the issues and the specific proposals made herein.

70. IT IS FURTHER ORDERED, pursuant to Section 1.419 of the Commission's Rules, 47 C.F.R. § 1.419, That an original and five copies of comments may be filed with the Secretary, Federal Communications Commission, Washington, D. C. 20554 on or before August 8, 1983, and that replies may be filed on or before October 7, 1983. In reaching its decision in this proceeding, the Commission may take into consideration information and ideas not contained in the comments, provided that such information or a writing indicating the nature and source of such information is placed in the public file, and provided that the fact of the Commission's reliance on such information is noted in the Report and Order.

71. IT IS FURTHER ORDERED, pursuant to Section 1.2 of the Rules of the Commission, 47 C.F.R. § 1.2, and authority delegated under Section 0.291 of the Rules of the Commission, 47 C.F.R. § 0.291, That meetings among carriers, under the aegis of the Common Carriers Bureau, MAY CONTINUE DURING THE PENDENCY OF THIS PROCEEDING pursuant to the decision of the Commission in *American Telephone and Telegraph Company (Offer of Facilities for Use by Other Common Carriers)*, Docket No. 20099, 52 FCC 2d 727, 733 (1975).

72. IT IS FURTHER ORDERED, That this proceeding shall be continued as a non-restricted notice and comment rulemaking

proceeding. For purposes of this non-restricted notice and comment rulemaking proceeding, members of the public are advised that *ex parte* contacts are permitted from the time the Commission adopts a notice of proposed rulemaking until the time a public notice is issued stating that a substantive disposition of the matter is to be considered at a forthcoming meeting or until a final order disposing of the matter is adopted. In general, an *ex parte* presentation is any written or oral communication (other than formal written comments/pleadings and formal oral arguments) between a person outside the Commission and a Commissioner or a member of the Commission's staff, which addresses the merits of the proceeding. Any person who submits a written *ex parte* presentation must serve a copy of that presentation on the Commission's Secretary for inclusion in the public file. Any person who makes an oral *ex parte* presentation addressing matters not covered fully in any previously-filed written comments for the proceeding must prepare a written summary of that presentation; on the day of oral presentation, that written summary must be served on the Commission's Secretary for inclusion in the public file, with a copy to the Commission official receiving the oral presentation. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. *See generally*, Section 1.1231 of the Commission's rules, 47 C.F.R. § 1.1231.

73. And, IT IS FURTHER ORDERED, That the Secretary shall cause a copy of this Notice of Proposed Rulemaking to be published in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

SEPARATE STATEMENT OF COMMISSIONER JOSEPH R. FOGARTY

In Re: MTS and WATS Market Structure, CC Docket No. 78–72, Phase III, Notice of Proposed Rulemaking on Interconnection in the Wake of Access Charges and Implementation of the MFJ.

I am pleased to see that the Regional Bell Operating Companies and the major Independent exchange carrier companies have already begun to form an association of exchange carriers for the specific purpose of structuring, planning, and formulating telephone network standards in the coming post-divestiture era.* Such an

* *See* Telecommunications Reports, Vol. 49, No. 16, at 44 (April 25, 1983), "Washington Legislative Council Members Move on Group to Set Network Standards."

industry planning organization is, in my judgment, absolutely vital for this nation's national defense and emergency preparedness, as well as the basic integrity and viability of our national telecommunications network. I am also pleased that this *Notice* promises that the Commission's public interest imprimatur will be given to an industry planning body in the performance of its appointed interconnection and exchange access tasks.

Common Carrier, Complaint Against
Common Carrier, Rate or Tariff, Unlawful
Common Carrier, Rates, Just and Reasonable Charges

AT&T's refusal to honor MCI's order for Telpak circuits in 1975 on the basis of customer premises tariff restrictions was unjust, unreasonable and discriminatory in violation of Section 201(b) and 202(a) of the Communications Act and resulted in injury to MCI. Damages assessed. Prejudgement interest awarded on contingency basis.
–MCI v. AT&T
CC Docket No. 81–217

FCC 83–236

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of MCI TELECOMMUNICATIONS CORPORATION v. AMERICAN TELEPHONE AND TELEGRAPH COMPANY AND THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY and In the Matter of MCI TELECOMMUNICATIONS CORPORATION	CC Docket No. 81–217

Appearances

Ruth S. Baker-Battist, William J. Potts and *John M. Pelkey*, on behalf of MCI Telecommunications Corporation; *Alfred Winchell Whittaker, Hiram D. Gordon, M. Jean Dabney* and *Michael J. Goldey*, on behalf of American Telephone and Telegraph Company; *Robert M. Ralls*, on behalf of Pacific Telephone and Telegraph Company; *Louise L. M. Tucker, William Gerstenslager, Gay Ludington* and *Theodore D. Kramer*, on behalf of the Chief, Common Carrier Bureau, Federal Communications Commission.

Decision

(Issued: May 12, 1983; Released: June 8, 1983)

By the Commission: Commissioner Fogarty dissenting; Commissioner Dawson concurring in the result

Preliminary Statement

1. This case involves the formal complaint of MCI Telecommunications Corporation (MCI) filed September 22, 1976, against American Telephone and Telegraph Company (AT&T) and Pacific Telephone and Telegraph Company (PT&T). In October 1979, the Commission denied MCI's complaint.[1] MCI sought judicial review of the 1979 decision in the United States Court of Appeals for the District of Columbia Circuit.[2] In June 1980, the Commission voluntarily requested the Court to remand the case to the Commission for "consideration of matters raised in MCI's brief which either were not addressed or were addressed inadequately in the order under review."[3] The Court ordered the remand in September 1980. On April 7, 1981, the Commission released its Designation Order herein.

2. The Commission specified that an expedited proceeding be held to determine the following issues:

(a) Whether AT&T's refusal to accept MCI's April 10, 1975 order of two bundles of Telpak C offerings from Oakland, California to Los Angeles, California was unjust or unreasonable or otherwise in violation of Sections 201(b) or 202(a) of the Communications Act;

(b) Whether, and if so, to what extent, AT&T's response to MCI's March 31 and April 8, 1975 orders for 116 voice grade circuits from Phoenix, Arizona to Oakland, California was unjust or unreasonable or otherwise unlawful under Sections 201(b) or 202(a) of the Communications Act; and

(c) What damages, if any, should be awarded to MCI for any unlawful acts or omissions of AT&T found under issues (a) and (b) above.

3. Following hearings held in June, July and October 1981, Presiding Judge Joseph Chachkin released his Initial Decision[4] on December 7, 1981. With respect to AT&T's refusal to provide Telpak circuits to MCI (Issue (a)), the Administrative Law Judge (ALJ) concluded that AT&T's customer premises and resale tariff restrictions under its Tariff FCC No. 260 were unjust, unreasonable, and discriminatory in violation of Sections 201(b) and 202(a) of the Communications Act and that those restrictions could not justify

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[1] *MCI Telecommunications Corporation* v. *AT&T*, 74 FCC 2d 184 (1979).

[2] *MCI Telecommunications Corporation* v. *FCC*, No. 79-2315 (D.C. Cir., filed Nov. 2, 1979).

[3] 85 FCC 2d 994, 995 (1981) (Designation Order).

[4] FCC 81D-62.

AT&T's refusal to satisfy MCI's order for Telpak service. Under Issue (b) the ALJ concluded that MCI had failed to demonstrate that AT&T's quotation of 25 weeks as the length of time necessary to provide 116 circuits to MCI pursuant to Tariff FCC No. 266 was unreasonable, discriminatory or otherwise in violation of Sections 201(b) and 202(a) of the Act. The ALJ determined that AT&T's failure to provide the Telpak circuits to MCI had damaged MCI and awarded damages to MCI in the amount of $931,880.15. On January 6, 1982, MCI, AT&T and PT&T and the Common Carrier Bureau filed Exceptions to the ALJ's Initial Decision. Each of the parties filed a Reply to the other parties' Exceptions on January 20, 1982. On January 20, 1982, AT&T and PT&T requested that we hold oral argument on the Exceptions filed in this proceeding. We do not believe that oral argument would elucidate any significant factual or legal issue involved herein. Accordingly, we shall deny the foregoing requests for oral argument.

4. Except as modified or clarified by this Decision, we hereby adopt the findings of fact and conclusions of law set forth in Judge Chachkin's Initial Decision, *supra*. Nevertheless, we shall set forth the general factual background of this proceeding and the final determinations of the ALJ so that the parties' Exceptions can be considered in their appropriate context.

Initial Decision

A. *Background*

5. In February 1975, MCI and General Motors (GM) entered into a contract whereby MCI agreed to provide Common Control Switching Arrangement (CCSA)[5] private line circuits between the Midwest (Chicago and Detroit) and a new CCSA switch being built by AT&T at Oakland, California. In choosing MCI as the provider of this service, GM specifically rejected the option of obtaining service from AT&T.[6]

6. MCI comtemplated that the CCSA circuits would be provided as follows: over existing MCI facilities from the Midwest (Chicago and Detroit) to either Phoenix, Arizona or Los Angeles, California and over AT&T and PT&T facilities between MCI's West Coast terminations (Phoenix or Los Angeles) and the GM switch in Oakland. MCI preferred the Phoenix terminal to assure interstate rate treatment with respect to the facilities it desired to obtain from AT&T and PT&T. Therefore, MCI ordered 116 voice grade circuits from Phoenix to Oakland under AT&T's Other Common Carrier

[5] CCSA is an arrangement which links together a customer's private line circuits between its various offices through switches located on the telephone company's premises. *See* Joint Exhibit 1, para. 1.

[6] Joint Exhibit 1, para. 5.

(OCC) Tariff FCC No. 266 as a means of obtaining the facilities necessary to fulfill the contract with GM.[7] Although MCI placed this order by early April 1975, AT&T contended that it could not provide the requested facilities in less than 25 weeks and thus would be unable to supply the circuits in time for MCI to meet the early July 1975 deadline established by its agreement with GM.[8]

7. In early April 1975, MCI also placed an order for 120 circuits at the TELPAK rate between the MCI terminal in Los Angeles and the CCSA switch in Oakland.[9] The TELPAK bulk price for such circuits would have been significantly less than the price for such circuits if purchased individually. AT&T refused to provide the circuits, basing its refusal exclusively on the Tariff No. 260 restriction prohibiting the termination of private line circuits at any point other than premises at which the customer has "a regular and continuing requirement to originate or terminate communications."[10] This restriction is commonly known either as the "customer premises" or the "piece-out" restriction.

8. After AT&T refused to lease MCI circuits at the Telpak rate and also asserted that it could not provide MCI with circuits under FCC Tariff No. 266 in a timely fashion, MCI obtained 118 circuits from the Pacific Telephone and Telegraph Company ("PT&T"), a subsidiary of AT&T.[11] The circuits which PT&T provided, while identical to the circuits which AT&T would have supplied to MCI if AT&T had filled MCI's Telpak order, were tariffed at a rate nearly six times that charged for Telpak.[12]

B. *Conclusions*

25 Week Issue—Issue (b)

9. The Judge concluded that MCI had failed to develop facts demonstrating that AT&T's treatment of MCI's Tariff No. 266 order was unreasonable, discriminatory or otherwise in violation of Sections 201(b) or 202(a) of the Communications Act.[13] Since MCI had failed to meet its burden of proof, AT&T was not liable for damages under this issue.

10. The Judge found that AT&T's response in April 1975 that it needed 25 weeks to provide the Tariff 266 Circuits was based on the

[7] Jt. Ex. 1, paras. 7 through 9.

[8] Jt. Ex. 1, para. 10.

[9] Jt. Ex. 1, para. 14; Tr. 781.

[10] Jt. Ex. 1, Documents 9 and 10. Transcript 276, 200.

[11] Jt. Ex. 1, para. 18.

[12] The Telpak charge was $32,000 per month, whereas PT&T charged about $181,000 per month. 85 FCC 2d 994, 995–96 (1981).

[13] Section 201(b) makes unjust and unreasonable practices and regulations unlawful. Section 202(a) makes it unlawful for any common carrier to unreasonably discriminate with respect to its charges, practices, regulations, facilities and services.

general knowledge and experience of AT&T engineers employed in its Western Area Engineering Department.[14] AT&T's report prepared in 1976 which detailed the components of the various intervals totalling 25 weeks[15] substantiated the correctness of the earlier judgment. The ALJ decided that AT&T's quote of 25 weeks to provide the facilities required by MCI was entirely reasonable. If anything, the 25 week schedule was ambitious, and MCI had not offered any evidence requiring a different conclusion.

11. The 25 week period envisioned "normal" time intervals. Normal time intervals means following regular engineering procedures. It does not contemplate extraordinary efforts such as treating a particular job on a priority basis.[16] The 25 week period quoted by AT&T took into consideration the fact that AT&T had other customers besides MCI and that all customers would be treated on a first come, first served basis. Indeed, the ALJ observed, if AT&T had shown preference to MCI in filling its order, it might be concluded that AT&T had discriminated against its other customers in favor of MCI. Although the Commission has not had occasion to comment on AT&T's method of handling orders from customers for large number of circuits, it has noted that in a case where simultaneous demand cannot be accommodated, the provision of service on a "first come first served" basis is not unreasonable or unduly discriminatory within the meaning of Sections 201 and 202 of the Act.[17]

12. The procedures for processing OCC requests were the subject of discussion in the Docket 20099 settlement negotiations.[18] MCI participated in these discussions. Docket 20099 provided for expedition of the normal time intervals at the customer's request. The findings show that some of the activities which AT&T had to perform to fill MCI's order could have been expedited. However, MCI never requested expedition. The ALJ concluded that it was doubtful, even assuming that expedition had been requested, that MCI's time constraints could have been accommodated.

Telpak Issue—Issue (a)

13. The ALJ concluded that AT&T denied MCI's Telpak request on the basis of the customer premises restriction contained in Tariff 260. Although the resale restriction was not considered in evaluating MCI's order, AT&T's Business Relations Manager for Long Lines in

[14] Tr. 677–78.

[15] MCI Ex. 6.

[16] Tr. 693–94.

[17] *Metrock Corp.*, 73 FCC 2d 802, 806 (1979). *See also Spanish International Network, Inc. et al.*, 78 FCC 2d 1451, 1465–66 (1980).

[18] The Commission accepted the settlement agreement in Docket No. 20099 in *American Telephone & Telegraph Co.*, 52 FCC 2d 727 (1975).

1975 testified that MCI's use of Telpak to provide service to GM would violate the resale restriction contained in that tariff.[19] The ALJ found that the lawfulness of AT&T's action denying MCI's Telpak request turns on the lawfulness of these restrictions.

14. The customer premises or "piece-out" provision included in Section 2.6.3 of Tariff 260 restricted interconnection of private line services to premises where the customer had a regular and continuing requirement to originate or terminate communications.[20] Pursuant to the customer premises restriction, AT&T would not provide private line service between Cities A and B if the potential customer wished to provide its own communications system between Cities B and C and City B was merely to be used to connect the AT&T line with the customer's own system. Similarly, AT&T would not provide the circuit between Cities A and B if that circuit were merely to be connected at City B to the circuit of another common carrier between Cities B and C.[21] However, the tariff contained exceptions to the customer premises restriction for several classes of customers. Thus, AT&T provided service to the international record carriers (IRCs) for use by the IRCs' customers, even though the service did not terminate at the customer's premises.[22] AT&T also supplied service to an IRC's data message switcher in order to permit the IRC to connect to AIRCON, PLC or ARX services even though a customer's premises was not involved.[23] Similarly, AT&T would have provided service to a switch, not located on a customer's premises, if the switch were owned by a composite data service vendor and were used for the switching of data messages. AT&T ignored the customer premises restriction if NASA or the U.S. Air Force needed service.[24] AT&T also made an exception to the restriction if an entrance facility connection between a customer's microwave system and that customer's premises were involved.[25]

15. In addition, AT&T did not require that the interconnection take place at a customer's premises if the connection were to be between AT&T and either a Bell System operating company or an independent telephone company, such as the Lincoln Telephone and Telegraph Company.[26] Thus, the tariff in 1975 discriminated among

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[19] Tr. 278–79.

[20] Jt. Ex. 1, Document 10; Tr. 200.

[21] Tr. 205–06.

[22] Tr. 207–08.

[23] AIRCON, PLC, and ARX were the names of computerized message switching services provided by RCA Global Communications, Inc., Western Union International and ITT World Communications, Inc. These services permitted customers to share the use of computers to switch data and telegraph services. *See American Telephone and Telegraph Company*, 60 FCC 939, 940 (1976).

[24] Tr. 218–221.

[25] *See* para. 53 of the Initial Decision, (I.D.); and Tr. 232.

[26] *See* paras. 51 and 52 of the I.D.

various classes of customers. Further, the ALJ observed that AT&T's OCC Tariff No. 266 offered to other common carriers in 1975 the same facilities which MCI sought pursuant to the Telpak tariff, but without the customer premises restriction and at a higher price. Therefore, he concluded that the Telpak tariff discriminated in connection with the provision of like communications services, and that AT&T had not justified the discriminatory treatment.

16. The ALJ noted that AT&T contended that the customer premises restriction was necessary to protect AT&T from economic harm resulting from impairment of its nationwide average pricing scheme and to prevent technical harm to the network. AT&T asserted that carriers such as MCI would choose to provide their own facilities for the high density, low cost portion of the overall route, while leasing only the low density high cost portions from AT&T.[27] This would allegedly undermine AT&T's nationwide average pricing scheme which is based on the average costs for high density and low density routes. The ALJ concluded that AT&T's claim is undercut by the fact that the tariff restriction made no distinction between high-cost and low-cost routes. The restriction was based on the type of termination, not on the type of route. Thus, the restriction acted to prevent the interconnection of high-cost OCC or private microwave routes with low-cost AT&T routes just as much as it served to prevent the converse situation.[28] As long as the customer had a need to originate and terminate communications at the location which linked the routes, the customer premises restriction would have permitted the interconnection. Moreover, the special construction provision of FCC Tariff No. 260 allowed AT&T to charge a customer for costs incurred in providing a costly facility between two cities for the purpose of connecting that facility to an OCC circuit or a private microwave system.[29]

17. Further, the ALJ concluded that AT&T has presented no evidence to document economic harm to itself or to the public if it were to de-average its prices. Significantly, AT&T was advised in 1972 by its Council of Economic Advisors that the best economic answer to cream skimming is not to prohibit piece-out but to abandon nationwide average pricing and to price each route according to its costs.[30] If such pricing were used, according to the Economic Advisors, there would be no economic justification for refusing to piece-out. Thus, the ALJ noted that the economic rationale advanced by AT&T in support of its customer premises restriction was belied by its own Council of Economic Advisors.

18. The ALJ also determined that AT&T's end-to-end responsi-

[27] Tr. 237.
[28] Tr. 239–40.
[29] Tr. 259–60.
[30] MCI, Ex. 13, p. 1, and para. 60 of the I.D.

bility rationale is similarly unsupported, and without merit. AT&T made the bare assertion that unless one carrier or individual has responsibility for the entire telephone network, the probability of it not working properly is very high.[31] However, AT&T offered no evidence in support of its contention that harm to the network or technical difficulties would result if piece-out was allowed. Indeed, AT&T admitted there were no technical studies to support its theory of harm to the network if the customer premises restriction were not in effect.[32] In this connection, as noted by the Commission in the "Piece-Out" decision, which has not been rebutted by AT&T:

> "[n]o greater potential for technical or engineering harm to AT&T's network results from termination of Tariff 260 services at the premises of OCCs than results from termination of like circuitry obtained under AT&T 266 and B.O.C. Tariff 3 at the premises of OCCs."[33]

In the absence of a showing of specific technical harm to the network or economic loss to the carrier that will impair its ability to serve the public adequately, a restriction on customer interconnection is unlawful. *Hush-a-Phone Corp.* v. *U.S.*,[34] and *Carterfone*.[35] In *Carterfone*, the Commission rejected as unreasonable:

> ". . . AT&T's position that because AT&T cannot control the interconnected private system, interconnection is by definition a degradation of the message toll telephone system . . . without regard to the actual harmful effects."[36]

19. The ALJ concluded that MCI had met its burden of demonstrating that AT&T's refusal to accept its Telpak Order on the basis of the customer premises restriction was unjust, unreasonable and unduly discriminatory in violation of Sections 201(b) and 202(a) of the Communications Act. Likewise, he held that a refusal to accept MCI's Telpak Order on the basis of the resale restrictions would also be violative of Sections 201(b) and 202(a) of the Act.

20. Essentially, the resale restriction meant that AT&T would refuse to provide service to a customer because that customer was not the ultimate user of the service.[37] In addition, AT&T's Tariff No. 260 contained certain restrictions, known as use restrictions, which limited the purposes for which services included in that tariff, such as Telpak, could be used. The use restrictions of AT&T Tariff 260 complemented the resale restriction, in a further effort to ensure that such services could not be resold.[38] AT&T asserted that the

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[31] Tr. 251.

[32] Tr. 258, 238–39. *See* para. 49 of the I.D.

[33] *AT&T Restrictions on Interconnection of Private Line Services*, 60 FCC 2d 939, 945 (1976).

[34] 238 F.2d 266 (D.C. Cir., 1956).

[35] 13 FCC 2d 420, 423 (1968); *recon. denied*, 14 FCC 2d 571 (1968).

[36] 14 FCC 2d 571, 572.

[37] Tr. 300.

[38] Tr. 279, 281–285, and Jt. Ex. 1, Document 11.

restrictions were needed to prevent the establishment of a message telecommunications service (MTS) and to prevent the undercutting by a reseller of AT&T's unit rates for message and private line service.[39] The ALJ determined that neither of these reasons can justify the imposition of the resale and use restrictions.

21. The ALJ concluded that AT&T's claim that its resale and use restrictions were necessary to prevent the establishment of a type of MTS pursuant to established Commission policy is both factually and legally irrelevant in the context of this case. He found that the evidence was clear that MCI wanted circuits to provide CCSA service to GM, and that the Commission had already ruled that CCSA was a private line service. *See Bell System Tariff Offerings.*[40] Furthermore, contrary to the premise of AT&T's rationale for the restrictions, the ALJ concluded that there was no legal prohibition against the provision of MTS by MCI at the time of the GM circuit order. See *MCI Telecommunications Corp.* v. *FCC.*[41]

MCI's Exceptions

22. In its Exceptions, MCI asserts that the ALJ erred with respect to his conclusions under Issue (b) and that the ALJ should have awarded MCI prejudgment interest on the damages awarded to MCI under Issue (c). With respect to Issue (b), MCI claims that AT&T should have borne the burdens of proof and of going forward with the presentation of evidence under that issue, because the facts necessary to determine whether the requested circuits were available or whether AT&T could establish such circuits in less than 25 weeks were uniquely within the knowledge of AT&T. This argument is in direct conflict with the Designation Order in this proceeding, which explained that relevant case law concerning analogous complaint proceedings before the Interstate Commerce Commission has established the principle that a carrier's customer has the burden of proving unreasonableness as well as damages in a complaint proceeding.[42]

23. MCI contends that the burden of proof properly rests with the carrier when it is the sole repository of information which could establish the lawfulness of its tariff actions, citing, *inter alia, Atchison, Topeka, and Santa Fe Ry. Co.* v. *United States,*[43] *Chesa-*

[39] Tr. 298, 281.

[40] 46 FCC 2d 413 (1974); *aff'd sub nom. Bell Telephone Company of Pennsylvania* v. *FCC,* 503 F.2d 1250 (3rd. Cir. 1974); *cert. denied,* 422 U.S. 1026, *reh. denied,* 423 U.S. 886 (1975).

[41] 561 F.2d 365 (1977); *cert. denied,* 431 U.S. 1040; *mandate enforced,* 580 F.2d 590, *cert. denied,* 439 U.S. 980 (1978).

[42] *See* 85 FCC 2d 999 (1981), citing *Southern R. Co.* v. *Seaboard Allied Milling Corp.,* 442 U.S. 444, 454–55 (1979).

[43] 218 F. Supp. 359, 374 (N.D. Ill., 1963).

peake and Ohio Ry. v. *United States*,[44] and *Referral of Chastain* v. *AT&T*.[45] We agree with the Common Carrier Bureau that the cases cited by MCI stand for the principle that a carrier bears the burden of proving the reasonableness of its actions only after the complainant has established a *prima facie* case of unreasonableness. After having reviewed the record evidence, the Findings of Fact contained in paragraphs 4 through 38 of the Initial Decision and the Conclusions of Law in paragraphs 82 through 87 of the Initial Decision concerning AT&T's response to MCI's request for 116 interstate circuits pursuant to Tariff FCC No. 266, we have determined that MCI has failed to demonstrate a *prima facie* case that AT&T's treatment of MCI's tariff order was unreasonable, discriminatory or otherwise in violation of Sections 201(b) or 202(a) of the Communications Act. Therefore, MCI's arguments that AT&T did not submit sufficient evidence or provide enough witnesses to carry its burden of proof under issue (b) are completely irrelevant and must be disregarded.

24. MCI further excepts to the ALJ's conclusion in paragraph 87 of the Initial Decision that AT&T made its employees and records available to MCI in a timely fashion. MCI claims that the basic documents necessary to determine the availability of circuits were the year-end computer summaries for the years 1974 and 1975, but that when it requested that AT&T supply it with the computer summaries for 1975 and the latter months of 1974, AT&T stated that those tapes were too seriously deteriorated for a suitable print-out to be made. Thus, MCI asserts that AT&T did not provide any documentary evidence demonstrating that the 116 requested circuits were not available. In response, AT&T explains that since the circuit records to which MCI refers were updated and superseded on almost a daily basis in 1975, the data contained in the year-end reports would not have shown the facilities actually available in April 1975.[46] Thus, there is no evidence that AT&T sought to hide relevant evidence from MCI. Moreover, the record evidence summarized in paragraphs 7 through 22 of the Initial Decision establishes that AT&T lacked sufficient spare individual circuits in April 1975 to meet MCI's requested service and that the only feasible way to provide MCI with 116 direct Phoenix-Oakland circuits was over two spare Phoenix-Los Angeles supergroups which had to be connected with two spare Los Angeles-Oakland supergroups.[47]

25. Regardless of which party should have had the burden of

[44] 11 F. Supp. 588, 593 (S.D. W. Va.; 1935), *aff'd*, 296 U.S. 187 (1935).

[45] 49 FCC 2d 749, 751 (1974), *vacated on other grounds*, 65 FCC 2d 25 (1977).

[46] *See* AT&T's Reply to the Exceptions filed by MCI and the Common Carrier Bureau, p 20 n. 29; para. 87 of the Initial Decision; and AT&T's Reply to the Proposed Findings of Fact and Conclusions of MCI and the Common Carrier Bureau, pp. 23–24.

[47] Tr. 450–52, 460–61, 661.

proof in this proceeding, MCI contends that the manner in which AT&T and PT&T reacted to the MCI order under Tariff FCC No. 266 indicates that AT&T's response was unjust and unreasonable. Its argument is that AT&T's assertion that it would need 25 weeks to provide MCI with 116 circuits from Phoenix to Oakland assumed a need for Western Electric services which AT&T did not prove. However, the record evidence establishes that the supergroup connection work, which AT&T needed to prove service to MCI in 1975 under Tariff No. 266, was performed by Western Electric installers.[48]

26. While MCI claims that AT&T's "assumption" that Western Electric work was required "takes on special significance" because PT&T provided MCI with 116 circuits without any Western Electric involvement, this argument is also without merit. It omits the facts that AT&T did not have available 116 spare circuits between Phoenix and Los Angeles and that the 116 circuits provided by PT&T between Los Angeles and Oakland did not involve supergroup connections, but were a collection of individual idle spare circuits from other established routes.[49] In brief, since no circuit or carrier equipment was needed for PT&T to provide the 116 individual circuits from Los Angeles to Oakland, no Western Electric work was needed.[50]

27. MCI further argues that AT&T's 25-week projection amounted to a refusal to meet MCI's needs and was an attempt to stifle competition from MCI, since General Motors had decided to cancel part of its previous order placed with AT&T for private line service to Oakland and to buy that part of its order from MCI. The record evidence does not support this argument, however. None of the CCSA trunks which AT&T had under construction for the GM CCSA service was routed through either Phoenix or Los Angeles,[51] and AT&T had insisted on a 78-week period for itself to extend GM's CCSA service to Oakland.[52] In addition, MCI's argument that AT&T failed to investigate the alternative of providing 116 circuits on a voice grade level through Los Angeles is equally faulty. The evidence makes clear that such an alternative would have involved 116 back-to-back (Phoenix-Los Angeles, Los Angeles-Oakland) circuits,[53] which were the very type of circuit which MCI had stated was not acceptable. MCI required "direct" (single link) circuits between

[48] *See* Mr. Lambert's testimony at Tr. 517, 522–23, 537, 690–91, 698 and the testimony of Mr. Louis Mahoney, a Western Electric manager in 1975, at Tr. 1245–47, 1269–70, and 1289.

[49] Tr. 706–07.

[50] *See* AT&T's Reply to MCI's Exceptions, p. 15.

[51] Jt. Ex. 1, para. 4.

[52] Jt. Ex. 1, para. 3 and Tr. 748–49.

[53] Tr. 706–09.

Phoenix and Oakland because GM needed the circuits to transmit data, as opposed to voice.[54]

28. MCI also argues that AT&T showed bad faith in failing to inform MCI about four direct channel groups (48 circuits total) which were available and could have been activated in 16 weeks. In response, AT&T points out that a 16-week interval would not have met MCI's required service date. Moreover, AT&T observes that it tried to "inform" MCI of the four channel groups, but could not because Mr. Knowles of MCI did not return certain telephone calls made by AT&T.[55] Thus, the record evidence does not establish that AT&T's actions were unjust, unreasonable, or otherwise unlawful under Sections 201(b) and 202(a) of the Communications Act.

29. MCI alleges that the manner in which AT&T reacted to MCI's Tariff No. 266 order resulted in confusion and delay and, therefore, that AT&T has failed to meet the minimum requirements of concern for the welfare and interest of customers imposed upon carriers by Section 201(b) of the Communications Act. MCI supports this theory by pointing to AT&T's one-week delay in notifying MCI that its order had to be placed with AT&T's Long Lines Business Relations Group in Somerset, New Jersey, rather than AT&T's GM National Account Manager in Detroit, where MCI first placed its order.[56] MCI stresses that this delay occurred despite the fact that it gave advance notice to AT&T's Detroit office that MCI would place this order. At the time it received this advance notice, AT&T did not inform MCI of the change in procedure.[57] MCI also argues that while AT&T researched the availability of circuits for MCI before notifying it of the change in procedure,[58] the results of that research were purposefully not relayed to MCI for eleven days.

30. Contrary to MCI's foregoing contentions, the record evidence summarized in paragraphs 11 through 22 of the Initial Decision does not indicate that AT&T delayed any of its actions on MCI's Tariff No. 266 request. Moreover, Section 201(b) of the Communications Act does not require AT&T to "affirmatively guide" MCI in placing orders. That section of the Act only requires that AT&T's practices "shall be just and reasonable." We agree with the ALJ's conclusion in paragraph 85 of his Initial Decision that AT&T has met this standard.

31. MCI also claims that the ALJ erred by failing to award it prejudgment interest on the damages it received. It asserts that when damages can be calculated with mathematical precision, prejudgment interest is awardable as of right, citing *Eazor Express,*

[54] Tr. 800–01; Jt. Ex. 1, para. 11.

[55] Tr. 406–07 and 414–15.

[56] *See* paras. 11 and 12 of the Initial Decision.

[57] Tr. 864–66.

[58] Tr. 439–441, 450–453.

Inc. v. *International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers.*[59] MCI argues that there the damages were easily calculated. Further, MCI observes that under the damages payment format envisioned by the ALJ, AT&T would pay MCI $931,880 and PT&T would then presumably look to MCI for the difference between $1,163,006, *i.e.*, the amount billed to MCI, and $320,000, which is the amount paid on account to MCI. Nevertheless, MCI notes, in the collection suit filed against MCI by PT&T,[60] PT&T seeks not only this difference, but also an award of interest. Thus, if PT&T wins its suit against MCI, MCI may be forced to pay interest to PT&T on an amount which, if PT&T's parent had acted lawfully, MCI would never have been required to pay. MCI contends that an award of interest to PT&T could result in MCI paying more in interest than it would have been required to pay for the Telpak circuits. Thus, MCI argues that AT&T should be required to reimburse MCI for whatever interest MCI must pay PT&T as a result of PT&T's collection suit.[61]

32. In response, AT&T claims that MCI has not proved damages and therefore is not entitled to either principal or interest on its complaint. We shall treat this argument when we deal with AT&T's Exceptions. Assuming *arguendo* that MCI is entitled to damages, AT&T asserts that MCI should not receive prejudgment interest. AT&T argues that, at best, an award of prejudgment interest to MCI is a matter of discretion.[62] AT&T also claims that MCI was obligated to pay the PT&T Tariff 126 charges when due, and that if AT&T is now compelled to reimburse MCI for any interest that MCI must pay PT&T, MCI would be rewarded for its unlawful action and awarded a preference prohibited by Section 202(a) of the Communications Act. Further, AT&T contends that MCI has had the use of the money it improperly withheld from PT&T and, therefore, interest should be imputed to MCI. Lastly, AT&T argues that even if MCI had promptly paid PT&T the Tariff 126 charges when due, an award of the difference between PT&T charges and Telpak charges would be a

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[59] 520 F.2d 951, 973 (3rd Cir. 1975), *cert.denied*, 424 U.S. 935 (1976).

[60] *PT&T* v. *MCI*, Case No. 77-2624-HP (C.D.Cal., filed June 8, 1977). This suit has been stayed pending our decision in this case.

[61] MCI cites *Illinois Central RR* v. *Texas Eastern Transmission Corporation*, 551 F.2d 943 (5th Cir., 1977). In that case, the District Court awarded prejudgment interest on a demurrage charge recovered by a carrier. The Court of Appeals affirmed the District Court on the theory that a converse rule would encourage shippers to withhold payment of demurrage charges on the slightest pretext since, regardless of the result of any litigation, they would always benefit to the extent of the interest value of the sums detained. 551 F.2d at 945.

[62] AT&T cites, *inter alia*, *Blau* v. *Lehman*, 368 U.S. 403, 414 (1962); *Eazor Express, Inc.*v. *International Brotherhood of Teamsters*, *supra*; and *Thomas* v. *Duralite Co.*, 524 F.2d 577, 589 (3d Cir., 1975).

penalty rather than damages and penalties do not draw prejudgment interest.[63]

33. It is clear from the cases cited by the parties that this agency has considerable discretion in deciding whether to award prejudgment interest in a case such as this one. If PT&T were not asking for prejudgment interest from MCI in PT&T's collection suit, we would not be inclined to award any interest to MCI, because MCI engaged in unlawful self-help by withholding the major part of the payments due to PT&T under valid tariffs.[64] Thus, MCI was not deprived of the use of most of the money in question during the prosecution of its complaint. Indeed, if we awarded interest to MCI in such circumstances, MCI would have had not only the use of its money during the period of controversy, but also an award of interest on that money that could rest only on the theory that MCI did not have its use during that time.[65] Thus, awarding interest on the damages, in effect, would compensate MCI two times: once, as a result of the interest; the second time, as a result of its actual retention of the money pending the completion of the complaint proceeding, with freedom to use it.

34. On the other hand, we agree with MCI that, if the California court should award prejudgment interest to PT&T in the collection suit against MCI, failure to require AT&T to reimburse MCI for this interest would unfairly penalize MCI. Thus, MCI would have to pay PT&T interest for the period in which MCI had use of the money it withheld from the tariff charge, but would not receive interest on the money owed by AT&T for the overcharge. Depending upon the action taken by the California court, MCI could suffer a net loss as the combined result of (1) an adverse decision in that court with interest and (2) an award of damages by the Commission in this proceeding without interest. While MCI should not have resorted to self-help by withholding payment, we will not exercise our discretion with respect to interest on damages in such a way that would permit MCI to be penalized unfairly for its misdeed, in a case where our basic finding is that AT&T acted unlawfully.

35. Therefore, we shall require AT&T to reimburse MCI for any prejudgment interest which MCI is required to pay to PT&T in the collection proceeding. The theory of our award is not that the prejudgment interest MCI pays to PT&T is part of the ordinary

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[63] AT&T cites *Pennsylvania RR* v. *International Coal Mining Co.*, 230 U.S. 184, 200 (1913) and *Rodgers* v. *United States*, 332 U.S. 371 (1947) for this proposition.

[64] *See* our earlier Memorandum Opinion and Order in *MCI Telecommunications Corp.*, 62 FCC 2d at 705–06, finding that MCI was legally obligated to pay the tariff charges to PT&T, that its resort to "self-help" was contrary to the Communications Act, and that MCI's proper recourse was through the complaint procedure.

[65] An award of interest in such a case is not a penalty, but an effort to make the damaged party whole by compensating it for any monetary loss.

damages that AT&T must pay. Rather, our theory is that if PT&T wins its collection suit against MCI, MCI may be forced to pay interest to PT&T on an amount which, if AT&T had acted lawfully, MCI would never have been required to pay. Moreover, an award of interest to PT&T could result in MCI paying more in interest than it would have been required to pay for the Telpak circuits.

Common Carrier Bureau's Exceptions

36. The Common Carrier Bureau concurs with the ALJ's findings of fact and conclusions of law under Issues (a) and (b), but has filed two Exceptions to the Initial Decision. In its first Exception, the Bureau argues that the ALJ erred by not considering the factual assertions contained in certain documents offered by AT&T in its rejected Exhibit 7 as evidence that the judgment against AT&T in *MCI Communications Corp.*v. *AT&T*, No. 74-C-633 (N.D. Ill., June 16, 1980) ("Chicago case") precluded the imposition of liability on AT&T pursuant to the Telpak issue (Issue (a)) under the legal doctrine of *res judicata*. We shall accept the documents submitted by AT&T in its rejected Exhibit 7 as evidence in this proceeding. Even on consideration of that evidence, however, we agree with the ALJ's determination that the jury verdict in the Chicago case does not preclude the imposition of liability in this case, for the reasons set forth in paragraphs 40 through 44, *infra*.

37. In its second Exception, the Bureau argues that the ALJ miscalculated the damages which should be awarded MCI. Thus, the Bureau contends that, rather than using the best cost per circuit features of AT&T Tariff FCC Nos. 260 (Telpak) and 266 in determining the charge which MCI should have paid, the ALJ should have used the charge for service under PT&T's Tariff 126 for 25 weeks and then used the Telpak charge for the remainder of the period during which MCI utilized PT&T circuits. The Bureau calculated that this amount totaled $498,632.05, which is $178,632.05 more than MCI actually paid PT&T. In this light, the Bureau argues that MCI has not yet incurred any damages. Therefore, the Bureau recommends that the actual calculation of damages should be held in abeyance pending the outcome of PT&T's collection suit against MCI, at which time MCI might have incurred actual damages.

38. The foregoing argument of the Bureau is without merit. As the ALJ explained in paragraph 102 of his Initial Decision, the rationale for the Bureau's argument is an erroneous assumption that no Telpak circuits would have been available during the relevant period that MCI utilized PT&T circuits due to the 25-week interval involved in providing new circuits. The Bureau has overlooked the fact that the only record evidence dealing with non-availability of circuits concerned MCI's request for circuits between Phoenix and Oakland. MCI's request for Telpak service was for circuits between Los Angeles and Oakland. It has not been alleged that there was a

shortage of circuits between Los Angeles and Oakland and the evidence demonstrates that circuits were, in fact, available to meet MCI's Telpak request. As AT&T's witness admitted,[66] AT&T would use PT&T circuits if necessary to fill a Telpak order and PT&T did, in fact, have sufficient circuits to fill MCI's order for 116 circuits.

AT&T's Exceptions

A. *Estoppel Arguments*

1. *Res Judicata*

39. AT&T claims that the ALJ erred with respect to his conclusions under Issue (a) (the Telpak issue) and Issue (c) (the damages issue). For the most part, AT&T's Exceptions repeat arguments already made in AT&T's proposed findings of fact and conclusions of law. Since the ALJ disposed of these arguments adequately, we shall treat these points briefly. First, however, we shall discuss the assertion made by AT&T in the Appendix to its Exceptions that, under the legal doctrine of *res judicata*, MCI is barred from recovering damages under Issue (a) (the Telpak issue) because MCI previously litigated or could have litigated the same claims made herein in *MCI Communications Corp.*v. *AT&T* (the "Chicago case"), *supra*. AT&T contends that under the doctrine of *res judicata*, a prior final judgment on the merits precludes all additional litigation involving the same parties or their privies based on a claim which was or could have been litigated as part of the original case.[67] Further, AT&T argues that, in the Chicago case, MCI sought damages allegedly arising from AT&T's denial of interconnection based upon (among other things) the customer premises restriction during a period that ended April 30, 1975,[68] a claim which encompassed the April 15, 1975 denial of Telpak circuits in the present case. In this regard, AT&T observes that MCI's complaint in the Chicago case mentioned AT&T's alleged denial of "interconnection at other than the premises of plantiffs' customers;"[69] that there was repeated testimony in the Chicago case concerning the customer premises restriction in AT&T's tariff and its effect on MCI;[70] that the example which the court used when it instructed the jury in the Chicago case on MCI's claim that AT&T denied it interconnection for multipoint service was the same example the ALJ used in paragraph

[66] Tr. 336.

[67] In support of this proposition, AT&T cites *Lawlor* v. *National Screen Service Corp.*, 349 U.S. 322, 326 (1955); *RKO General, Inc.*, 82 FCC 2d 291, 312 (1980); and 1B *Moore's Federal Practice*, § 0.405 at 621–22 (2d Ed. 1980).

[68] *See e.g.*, AT&T's Ex. 7, Tab 6, pp. 76–85.

[69] AT&T's Ex. 7, Tab 1, p. 18.

[70] *See* AT&T's Ex. 7, Tabs 7, 10, 11, and 12.

45 of his Initial Decision to explain AT&T's denial of Telpak to MCI;[71] and that MCI was awarded a special verdict in the Chicago case on its claim that AT&T denied it interconnection for multi-point service.[72]

40. AT&T has overstated the preclusive effect of the judgment in the Chicago case. The three sources AT&T cites in support of its expansive argument[73] explain that under the doctrine of *res judicata*, a judgment on the merits in a prior suit involving the same parties bars a second suit based on the same cause of action even to the extent of barring issues which might have been raised in the prior suit but were not. If the second suit involves a different cause of action, however, those same sources make clear that the principle of collateral estoppel applies rather than the principle of *res judicata*. When collateral estoppel applies, as it does in the case now before us, the prior judgment only precludes litigation of issues actually litigated and determined in the prior suit.[74] *Moore's Federal Practice* states that while, under the doctrine of collateral estoppel, parties are precluded from relitigating relevant and material matters that were adjudged in a prior suit, the parties are not, as to the different cause of action, precluded from raising and litigating matters that were not adjudged even though they could have been raised and litigated in the prior suit.[75]

41. AT&T claims that the ALJ erred when he ruled that *res judicata* was inapplicable because the Chicago case was an antitrust action, while the instant case is a regulatory proceeding arising out of the Communications Act. Thus, AT&T observes that successive actions brought under different statutes or theories do not avoid the application of *res judicata*.[76] Nevertheless, it is clear that *res judicata* does not apply here because the instant proceeding involves a different cause of action than was involved in the Chicago case. In this regard, courts have determined whether a subsequent lawsuit involves the same cause of action as a prior lawsuit by focusing on the questions of whether a different judgment in the second action would impair or destroy rights or interests established by the judgment rendered in the first action, whether the same evidence is necessary to maintain the second cause of action as was required in

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[71] *Compare* AT&T's Ex. 7, Tab 2 with para. 45 of the Initial Decision.

[72] AT&T's Ex. 7, Tab 4, p. 42.

[73] *See* the three sources cited in note 67, *supra*.

[74] *See e.g., Stebbins* v. *Keystone Ins. Co.*, 481 F.2d 501, 506 (D.C. Cir. 1973).

[75] 1B *Moore's Federal Practice*, § 0.410(1), p. 1153. This source cites *Cromwell* v. *County of Sac*, 94 U.S. 351, 352–53 (1876) for this principle.

[76] AT&T cites, *inter alia*, *Norman Tobacco & Candy Co.*v. *Gillete Safety Razor Co.*, 295 F.2d 362 (5th Cir. 1961) and *Williamson* v. *Columbia Gas and Electric Corp.*, 186 F.2d 464 (3d Cir. 1950), *cert.denied*, 341 U.S. 921 (1951).

the first, and whether the essential facts and issues in the second lawsuit were present in the first.[77] Applying these principles to the Chicago case and the instant case, it is clear that a judgment for AT&T in the present case would not impair any interests established by the judgment against AT&T in the Chicago case, that different evidence is necessary to prove the cause of action in this proceeding than was required in the Chicago case and that the essential facts and issues in this case were not present in the Chicago case.

42. Thus, in the Chicago case, MCI complained that AT&T monopolized the intercity market for business and data communications in violation of Sections 1 and 2 of the Sherman Act, whereas in this proceeding MCI has alleged that AT&T violated the Communications Act by unjustly refusing to provide Telpak service. This proceeding involves a different cause of action than the Chicago case because this proceeding arises under the Communications Act complaint procedure rather than under the antitrust laws, requires different proof, is subject to different rules of evidence and turns on different standards of conduct (*i.e.*, whether AT&T acted reasonably and lawfully in responding to MCI's requests for service versus whether AT&T hindered competition in certain markets). Clearly, the evidence in the Chicago case concerning AT&T's monopolization of relevant markets by refusing to provide MCI with essential local interconnections, such as FX or CCSA, was far different from the evidence in this case concerning AT&T's unlawful refusal to provide Telpak service. Further, the ALJ was correct when he explained that MCI was not collaterally estopped from bringing the suit now before us because there are no issues of fact common to this proceeding and the Chicago case.[78] Thus, AT&T's refusal to provide interstate circuits at the Telpak rate to MCI was not litigated in the Chicago case.[79]

43. As we indicated previously, we shall accept all of the various documents proffered by AT&T as its Exhibit 7 in this proceeding so that there will be no doubt that we have considered them in determining that the jury verdict in the Chicago case does not bar MCI from receiving damages in the case now before us. In this regard, the AT&T documents referred to in paragraph 39, *supra*, as evidence that MCI's claim in the Chicago case encompassed the April 15, 1975 denial of Telpak circuits in the present case actually suggest the opposite of what AT&T urges. Thus, the documents demonstrate

[77] *Herendeen* v. *Champion International Corp.*, 525 F.2d 130, 133–34 (2d Cir. 1975).

[78] Tr. 970–71.

[79] The antitrust case involved Telpak only insofar as it included an issue as to whether AT&T's Telpak offering amounted to predatory pricing. AT&T prevailed on this issue. AT&T has not shown that there was any allegation in the Chicago case that AT&T violated the antitrust laws by refusing to sell intercity circuits at Telpak rates to MCI; indeed, such an allegation would have been out of place in the context of the antitrust suit.

that the Chicago case focused on AT&T's refusal to provide MCI with local interconnections to its telephone lines or circuits and did not deal with the Telpak issue in the case now before us, *i.e.*, AT&T's refusal to provide intercity circuits. Moreover, this distinction is readily apparent if one compares, as AT&T suggests, the example which the court used when it instructed the jury in the Chicago case on MCI's claim that AT&T denied it interconnection for multipoint service[80] with the example the ALJ used in paragraph 45 of his Initial Decision to explain AT&T's denial of Telpak service to MCI. Thus, the multipoint interconnections involved in the Chicago case were between MCI and AT&T terminals in the same city and did not involve the provision of intercity facilities by AT&T to MCI which is involved in the case now before us.

44. In reaching our conclusion that the Chicago case does not bar MCI from prosecuting the case now before us, we have drawn upon our special expertise regarding complaints which properly fall under the Communications Act rather than the antitrust laws.[81] An article entitled *Preclusion/Res Judicata Variables: Adjudicating Bodies*, written by Professor Allan D. Vestal,[82] has particular relevance here. In his article, Prof. Vestal explains that a court or administrative agency must examine a number of variables to determine whether litigation of an issue has been precluded by an earlier proceeding. Thus, in addition to the parties involved in the instant suit and the prior suit and the nature of the controversy in the two suits, the adjudicatory bodies, *i.e.*, the one which handed down the earlier decision and the one before which the instant action is pending, must also be examined.[83] In this light, Prof. Vestal concludes that issue preclusion cannot be assumed where the second adjudicatory body is one with "some unusual competency in a particular matter."[84] Further, Prof. Vestal points out that agency determinations should not be foreclosed by a prior court decision

[80] AT&T's Ex. 7, Tab 2.

[81] We observe that a recent Memorandum Opinion of United States District Judge Charles R. Richey in *Southern Pacific Communications Company* v. *American Telephone and Telegraph Company*, Civil Action No. 78–0545 (D.C., issued December 21, 1982) contains a footnote (note 154, p. 244) which asserts that AT&T had no duty under the antitrust laws to lease Telpak circuits to specialized common carriers for resale. In this regard, Southern Pacific Communications Company is a specialized common carrier like MCI. Judge Richey's ruling in the foregoing antitrust case does not conflict with our conclusions that AT&T violated Sections 201(b) and 202(a) of the Communications Act when it refused to honor MCI's order for Telpak circuits. The fact that AT&T's conduct was unlawful under the Communications Act does not mean that it also was unlawful under the antitrust laws.

[82] 54 Geo. L.J. 857 (1966).

[83] *Id.*, at 860–61.

[84] *Id.*, at 886–87.

because different standards may govern the procedures and substantive decisions of administrative agencies and courts.[85] Thus, in determining whether the Chicago case precludes the case now before us, it is important to observe that the two cases involve different adjudicatory bodies which apply different rules of evidence and focus on dissimilar standards of conduct as well as the fact that the two cases involve separate causes of action.

2. The Agency Argument

45. Another estoppel argument raised by AT&T is that MCI ordered Telpak service as GM's agent and therefore lacks a justiciable claim to damages for any unlawful denial of service to GM. As the ALJ explained in paragraph 89 of his Initial Decision, we previously considered and rejected this contention in our initial denial of MCI's formal complaint.[86] Although our Designation Order vacated our previous denial of MCI's formal complaint, the reasoning supporting our ruling on AT&T's agency argument in our 1979 order denying MCI's complaint was correct. In brief, MCI ordered Telpak service for GM as GM's carrier. Thus, AT&T personnel treated the Telpak order as a "repeat" of earlier orders for the same purpose under AT&T's Tariff FCC No. 266.[87] As the ALJ stated in paragraph 89 of the Initial Decision, the evidence establishes that AT&T clearly understood that the Telpak services, though ordered in GM's name, were intended for the use and benefit of MCI in meeting its July 1, 1975, target date for providing comprehensive services to GM. AT&T itself had been an unsuccessful competitor for the GM contract and was aware of GM's needs.

46. Further, since AT&T knew the basis for MCI's Telpak order, AT&T also knew that MCI was acting as an independent contractor for GM and not as an agent.[88] Clearly, when MCI labelled itself as an agent of GM in placing its Telpak order, it was attempting to circumvent AT&T's Tarriff FCC No. 260 restrictions. Nevertheless, MCI was obviously making the design and the economic decisions regarding GM's service in the capacity of GM's carrier, and, more significantly, AT&T knew of the relationship between MCI and GM. Thus, as the ALJ stated in paragraph 89 of his Initial Decision, the agency designation in MCI's order which AT&T required did not mislead AT&T as to the relationship between MCI and GM or the purpose of GM's order. Moreover, in view of the actual relationship between MCI and GM and the purpose for which the Telpak order

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[85] *Id.*, at 888. *See e.g., North Carolina* v. *Charles Pfizer & Co., Inc.*, 537 F.2d 67, 73–74 (4th Cir. 1973); *cert.denied*, 429 U.S. 870 (1976).

[86] *MCI Telecommunications Corp.*v. *AT&T and PT&T*, 74 FCC 2d 188, 192 (1979).

[87] Tr. 275.

[88] *See e.g., United Insurance Company of America* v. *NLRB*, 304 F. 2d 86 (7th Cir. 1962); *Steen* v. *Potts*, 75 S.D. 184, 61 N.W. 2d 825 (1953); and *Restatement Second of Agency*, § 2 (1958).

was placed, MCI clearly had an interest in the Telpak transaction sufficient to entitle it to sue AT&T.[89]

3. *The Docket 20099 Argument*

47. AT&T states that MCI was barred from ordering Telpak under Tariff No. 260 by the Settlement Agreement in Docket No. 20099.[90] All of AT&T's arguments on this matter were rejected in paragraph 90 of the ALJ's Initial Decision. In brief, AT&T asserts that the terms of the Settlement Agreement required MCI to order all of its interstate facilities pursuant to Tariff 266 and all of its intrastate facilities pursuant to the appropriate Bell System Operating Company tariffs. Nevertheless, as the ALJ observed, paragraph 15 of the Settlement Agreement specifically states that the provisions of AT&T Tariff FCC No. 260 were not included in the matters designated for investigation in Docket No. 20099.[91] Further, a recurrent theme in AT&T's argument concerning the Settlement Agreement is that MCI could not order circuits under AT&T's Tariff FCC No. 260 because that tariff dealt with "services" or end-to-end offerings, while Tariff FCC No. 266 involved the provision of "facilities" or various components necessary for an OCC (Other Common Carrier, like MCI) to complete its end-to-end service offering.[92] Nevertheless, AT&T's own witness, Mr. Delane, who was Manager of Business Relations for AT&T's Long Lines Department in 1975, admitted that there was no language in Tariff 260 which would prevent an OCC from ordering facilities under that tariff or would require the OCC to order facilities under Tariff 266.[93] In brief, the Settlement Agreement in Docket No. 20099 did not bar MCI from ordering Telpak service.[94]

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[89] *See Restatement Second of Agency* § 364 (1958). *See also, Restatement Second of Agency*, § 372(1) and Comment (b).

[90] *AT&T*, 52 FCC 2d 727, 738 (1975).

[91] 52 FCC 2d at 742. The same paragraph refers to two other paragraphs of the Settlement Agreement which deal with Tariff FCC No. 260 to a limited extent. Nevertheless, as the ALJ suggested, it is clear that the Agreement does not bar MCI from ordering Telpak service.

[92] Tr. 318–19.

[93] Tr. 325–26.

[94] This is not inconsistent with our ruling in *Associated Press* v. *AT&T*, 16 FCC 2d 277 (1968), *aff'd, Associated Press* v. *FCC*, 452 F.2d 1290 (D.C. Cir. 1971). In that case, we refused to allow press customers to pick and choose between rates for services and facilities contained in special press classification tariffs and rates for identical services and facilities contained in the general public offering. The point there was that the FCC, after having conducted a hearing, had authorized a special discount rate schedule for the press for use in the transmission of general news. The rate schedules for press and non-press uses had been structured differently, so as to make clear the Commission's intention to create "two distinct clases of . . . users to which different rate schemes applied." 452 F.2d 1298. In light of this careful scheme, the Court of Appeals agreed with the FCC that the press customers could not arrange their service packages with "selected parts" from

B. *Other Arguments Concerning the Telpak Issue (Issue (a))*

48. Many of AT&T's arguments with respect to the ALJ's findings and conclusions under the Telpak issue (Issue (a)) are irrelevant because they fail to focus on the question of whether the tariff restrictions under Tariff FCC No. 260 which were in effect in 1975 were "unlawful at the time and under the circumstances in which they were applied."[95] Thus, even though our Designation Order recognized that two 1976 Commission decisions had found the customer premises[96] and resale[97] restrictions to be unlawful, it rejected MCI's argument that it was entitled automatically to a judgment in its favor simply as a result of those decisions. We explained that the issues in MCI's complaint for damages are different from those in the 1976 policy making investigations and that there may be changes in circumstances or defenses available to AT&T which would justify a different result in this adjudicatory proceeding. Nevertheless, we stated that carrier-initiated tariff provisions which are merely allowed to become effective may later be found to be unlawful and thus subject the carrier to liability, citing *Arizona Grocery* v. *Atchison, T. and S.F.R. Co.*[98] We also explained that AT&T's customer premises and resale restrictions were never approved or prescribed by the Commission, but were initiated by AT&T and merely allowed to become effective. Thus, MCI had the burden of proving that the foregoing restrictions were unlawful when they were applied in 1975 as justification for refusing to fill the Telpak order.

49. Despite the foregoing directives in our Designation Order, AT&T argues that retroactive application of the 1976 *Resale and Shared Use Decision, supra*, would be legally impermissible and fundamentally unfair and that the ALJ imposed "retroactive liability on AT&T for the customer premises restriction without

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press and non-press parts of the tariffs. *Id.* at 1301.

AT&T has not made a comparable case here. While AT&T and the OCCs did negotiate rates for certain services and facilities in Docket No. 20099, there was no intention on the FCC's part to create distinct classes of users (*i.e.*, OCCs and non-OCCs) to which different rate schemes applied. The OCCs could and did obtain service and facilities under the negotiated rates. But they also have obtained service and facilities under AT&T's public offerings. In short, unlike the press situation, there was no comprehensive rate schedule in Docket No. 20099 that required the OCCs to take service under the negotiated rates to the exclusion of other rate schedules that offered service to the general public.

[95] 85 FCC 2d at 1000.

[96] *AT&T Restrictions on Interconnection of Private Line Services*, 60 FCC 2d 939.

[97] *Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities*, 60 FCC 2d 261 (1976); *recon. granted in part*, 62 FCC 2d 588 (1977); *aff'd sub nom AT&T* v. *FCC*, 572 F.2d 17 (2d. Cir); *cert.denied*, 439 U.S. 875 (1978).

[98] 284 U.S. 370 (1932).

making a determination whether retroactive liability would be fair and equitable."[99] Thus, AT&T refuses to recognize that the Designation Order made clear that "retroactivity" was not an issue to be tried. In the Designation Order, we explained that if AT&T's customer premises and resale restrictions were found to have been unlawful at the time and under the circustances in which they were applied, damages could be awarded for injury suffered as a result of those restrictions.[100] In brief, AT&T's retroactivity arguments have already been considered and rejected by this Commission in our Designation Order.

50. In similar fashion, AT&T argues that Section 203 of the Communications Act requires carriers to enforce all of their tariff provisions and that, therefore, the Commission may not impose liability on AT&T for meeting its obligation to enforce its tariff provisions prohibiting resale in 1975.[101] This contention flies in the face of the rationale set forth in the *Arizona Grocery* case, namely, that a common carrier can be held liable for unlawful activity undertaken pursuant to carrier-initiated tariff provisions which were allowed to become effective but were never specifically approved by the Commission. AT&T's argument would also render useless the complaint procedure for carrier customers provided for in Sections 206 through 209 of the Communications Act whenever carrier-initiated tariffs not approved or prescribed by the Commission are involved.

51. AT&T cites the Supreme Court decision in *Terminal Warehouse Co.*v. *Pennsylvania Railroad* [102] to support its theory that the Commission cannot impose what AT&T views as "retroactive" liability on a carrier which has enforced a tariff provision for a long period of time. In that case, however, the Supreme Court stressed that, under the Interstate Commerce Act (ICA), the Interstate Commerce Commission could impose liability on a carrier for activities conducted pursuant to a carrier-initiated tariff provision which had not been approved or prescribed by the ICC and which was later discovered to be unlawful, even though it had been in effect for several decades.[103] Significantly, as noted in our Designation

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[99] AT&T Exceptions at Appendix, p. 7.

[100] 85 FCC 2d at 1000.

[101] AT&T also argues that from July 1975 to June 1976, MCI apparently did not have a tariff covering the service it provided GM into Oakland, as required by Section 203 of the Act. In this regard, AT&T claims that the ALJ erred in rejecting its Exhibit 14. After having reviewed the data in AT&T's Exhibit 14 and MCI's Tariff No. 1 for July 1975 to June 1976, we find that AT&T has failed to establish a *prima facie* case that MCI did not have a tariff covering the service it provided GM into Oakland during that period. We hereby take official notice of MCI's Tariff No. 1 which was in effect from July 1975 to June 1976.

[102] 297 U.S. 500 (1936).

[103] *Id.*at 506 and 516.

Order, the language of Sections 206 through 209 of the Communications Act, which provide a complaint procedure for customers of communications common carriers, was lifted from the ICA. It would appear that AT&T is referring to language in the *Terminal Warehouse* case which explains that a carrier's liability under the ICA for a mistake of law should not be used to demonstrate that the carrier had been guilty of conspiring to violate the antitrust laws.[104] Nevertheless, there is no conflict between *Arizona Grocery* and the *Terminal Warehouse* case. It is clear that both of these cases support our explanation of the manner in which this case was to be tried in our Designation Order.

52. AT&T asserts that the ALJ erroneously shifted the burden of proof on the issue of the reasonableness of the resale prohibition in Tariff 260 from MCI to AT&T and that the record evidence does not support the ALJ's conclusions that the customer premises and resale restrictions in Tariff 260 were unreasonable and unduly discriminatory pursuant to Sections 201(b) and 202(a) of the Communications Act. AT&T's arguments in support of the foregoing general contentions consist of erroneous and irrelevant assertions and we shall not repeat them here. It is abundantly clear that the ALJ's findings of fact in paragraphs 45 through 73 of the Initial Decision and his conclusions of law in paragraphs 92 through 100 concerning the Telpak issue have overwhelming support in the record evidence and demonstrate that MCI carried its burden of proving that AT&T's refusal to accept MCI's Telpak order was unjust, unreasonable, and unduly discriminatory in violation of Sections 201(b) and 202(a) of the Communications Act.

C. *Arguments Concerning Damages*

53. Assuming *arguendo* that AT&T unlawfully refused to accept MCI's Telpak order, AT&T contends that MCI has failed to prove damages. First, AT&T claims that until MCI has paid PT&T the full amount it owes PT&T, MCI has suffered no actual damages. Further, AT&T argues that since the damage award is not contingent on satisfaction of MCI's obligation to PT&T, there is a possibility that MCI will obtain the "windfall" of being paid by AT&T to use PT&T's facilities without paying PT&T. We affirm the ALJ's conclusions that MCI has incurred damages as a result of its legal liability to pay PT&T in the amount of $1,163,006.79 and that MCI was required to pay AT&T only $231,126.64. Therefore, we concur with the ALJ that AT&T should pay the difference between the foregoing amounts as damages to MCI. Nevertheless, we shall make the award of

[104] *Id.* at 516.

$931,880.15 in damages to MCI contingent upon MCI's payment of the $843,006.79 it still owes PT&T.[105]

54. Second, AT&T asserts that MCI did not prove any actual damages. Thus, AT&T claims that MCI's showing of the difference between the charges for PT&T's circuits at Tariff 126 rates ($1,163,006.79) and the amount which MCI would have paid under AT&T's Tariff 260 and under Tariff 266 when the per-line rate was less expensive than Telpak ($231,126.64) is not sufficient to establish damages. We disagree. As the ALJ explained in paragraph 105 of his Initial Decision, the Supreme Court's decision in *ICC* v. *United States ex rel. Campbell*,[106] upon which AT&T relies, does not preclude the possibility that the foregoing rate discrepancy can be the proper measure of damages. All that *Campbell*, other court decisions, and our previous decisions require is that the plaintiff prove specific pecuniary loss in order to obtain damages.[107] Clearly, MCI has incurred actual damages totalling $931,880.15 as a result of being billed $1,163,006.79 by PT&T.

55. Third, AT&T argues that MCI failed to mitigate any damages it might have incurred. Thus, AT&T claims that if MCI had ordered the Phoenix-Oakland facilities under Tariff 266 in December 1974, when it first knew it would need Bell facilities to serve GM, AT&T would have had sufficient time to fill the order by July 1, 1975, which was the date that GM needed the circuits in question. Further, AT&T contends that if MCI had placed the order in February 1975, it could have used PT&T facilities from July 1 until mid-August[108] and the less expensive AT&T facilities thereafter. Nevertheless, GM did not place a firm order with MCI for the routes which would require MCI to procure circuits from AT&T until February 25, 1975.[109] In this regard, paragraph 10 of the Initial Decision summarizes the testimony of an MCI witness, Mr. Knowles, who explained why he did not believe that the GM circuits order would have been accepted by AT&T prior to the implementation of the Settlement Agreement in Docket No. 20099,[110] which was signed on March 13, 1975, by AT&T, MCI and the common carriers and accepted by the Commission on April 23, 1975. Although AT&T argues that it offered

[105] MCI has already paid PT&T $320,000.

[106] 289 U.S. 385 (1973).

[107] *See, e.g., Campbell, supra*, 289 U.S. 385 at 390, and *Hughes Sports Network*, 25 FCC 2d 550, 555 (Rev. Bd. 1970).

[108] We assume that AT&T is referring to PT&T facilities between Oakland and Los Angeles. MCI already had facilities between Phoenix and Los Angeles. *See* MCI Reply Brief, p. 17, para. 9 of the Initial Decision, and Tr. 774–778.

[109] Jt. Ex. 1, para. 5.

[110] *AT&T*, 52 FCC 2d 724, 738 (1975).

intercity facilities between points in different states under AT&T Tariff 266 in 1974,[111] it has not shown that MCI could have obtained the Phoenix-Oakland circuits it required under that tariff prior to March 31, 1975,[112] or that MCI was negligent or imprudent in placing its Tariff 266 order on March 31, 1975. Thus, in light of all the foregoing circumstances, it appears that MCI ordered the Phoenix-Oakland facilities with reasonable dispatch.

56. AT&T also alleges that MCI failed to mitigate damages by accepting AT&T's proposal to provide 46 Phoenix-Oakland circuits by July 1, 1975, additional circuits by mid-August, and the balance by mid-October 1975.[113] Thus AT&T claims that switching to these AT&T circuits would have substantially reduced the amount of MCI's liability to PT&T.[114] In response to these arguments, MCI points out that it began reducing the number of circuits rented from PT&T within two months of initiating service to GM and discontinued using PT&T circuits rented from PT&T within one year of initiating service to GM.[115] Further, MCI contends that it was under no obligation to obtain circuits from AT&T, especially when it could only obtain AT&T's circuits by ordering service between Phoenix and Los Angeles, where MCI already had facilities. We concur with MCI that its method of mitigating its damages was appropriate under the circumstances.

57. In this regard, we must recognize the fact that AT&T has conceded that 30 of the 46 circuits offered under Tariff 266 on April 18, 1975, were unsuitable for GM's Oakland CCSA requirement.[116] Further, although AT&T located an additional 48 circuits between Oakland and Phoenix, and AT&T estimated that it could make these circuits available by approximately mid-August, it does not appear that Mr. Knowles, who was MCI's representative in the negotiations,

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[111] AT&T cites its Exhibit 9, at 10; Tr. 1047–49; and revisions to AT&T's Tariff 266 contained in Transmittal No. 12107, which became effective on August 2, 1974.

[112] The testimony by Mr. Dalane which AT&T cites (Tr. 1047–49) clearly indicates that AT&T would not have provided MCI the Phoenix-Oakland circuits it sought for GM in January 1975. Further, the relevant tariff provisions allowing AT&T to provide the service required by GM did not become effective until May 15, 1975. *See* 3rd Revised Page 8 and 4th Revised Page 9 which added new subsections (F) and (G) to Section 2.1.4 of Tariff FCC No. 266. We hereby take official notice of the referenced tariff pages. We also take official notice of 2d Revised Page 9 (effective August 2, 1984) and 3rd revised Page 9 (effective January 15, 1975) of Tariff 266 which contain relevant provisions of Section 2.1.4 of Tariff 266 during the period of August 1974 to May 1975.

[113] *See* Joint Exhibit 1, paras. 10 and 12.

[114] AT&T cites Jt. Ex. 1, para. 22, line 6, which the ALJ includes as para. 80 of his Initial Decision. Data contained in para. 80 of the I. D. indicates that a switch from PT&T Tariff 126 on October 17, 1975, would have resulted in charges of $847,316.98 rather than the $1,163,006.79 which PT&T charged MCI for the circuits actually used by MCI.

[115] Jt. Ex. 1, para. 21.

[116] Jt. Ex. 1, para. 11.

was informed about these circuits. Rather, Mr. Knowles stated that he was informed by AT&T that 24 additional circuits would be made available a few weeks after July 1, 1975.[117] In addition, on April 18, 1975, Mr. Knowles was told by AT&T that it was unlikely that all 116 circuits could be supplied by the July 1, 1975 date and that it would take an additional two weeks to determine whether expedition by July 1, 1975, was possible.[118] Thus, given the apparent difficulty of obtaining 116 circuits from AT&T pursuant to Tariff 266 at the time when MCI needed them, it is understandable that MCI would be reluctant or cautious in asking AT&T to supply it with 116 circuits by mid-October. In light of all the relevant circumstances, MCI's efforts to mitigate its damages appear to have been reasonable.

PT&T's Motion for Expedited Disposition

58. In a Motion for Expedited Disposition filed May 20, 1982, PT&T requested that we dismiss MCI's complaint as to PT&T.[119] As the ALJ observed in paragraph 101 of his Initial Decision, MCI has not offered any evidence which demonstrates that PT&T acted improperly in providing service under Tariff 126 or played any part in AT&T's unlawful refusal to provide service under Telpak. In brief, there is no evidence that PT&T has violated the Communications Act or engaged in any improper conduct. Therefore, in order to promote the resolution of PT&T's suit to collect amounts due it from MCI,[120] which has been stayed pending our resolution of the complaint in this proceeding,[121] we shall grant PT&T's motion and dismiss MCI's complaint as to PT&T.

59. ACCORDINGLY, IT IS ORDERED, That the record in this proceeding IS REOPENED to accept into evidence the documents submitted by American Telephone and Telegraph Company and The Pacific Telephone and Telegraph Company as their Exhibit 7, which was rejected by the Administrative Law Judge on July 9, 1981; and the record is RECLOSED.

60. IT IS FURTHER ORDERED, That the request for oral argument filed January 20, 1982, by American Telephone and Telegraph Company and The Pacific Telephone and Telegraph Company IS DENIED.

61. IT IS FURTHER ORDERED, That the Brief and Exceptions filed by American Telephone and Telegraph Company and The Pacific Telephone and Telegraph Company, the Exceptions filed by MCI Telecommunications Corporation, and the Exceptions filed by

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[117] Jt. Ex. 1, para. 12; Tr. 406–07; MCI Ex. 7, p. 8.

[118] Tr. 797–98.

[119] On May 27, 1982, MCI filed a Motion to Strike PT&T's motion. The Common Carrier Bureau filed Comments supporting PT&T's motion on June 1, 1982. In light of our action granting PT&T's motion, MCI's motion will be denied.

[120] *PT&T* v. *MCI* Case No. 77–2624-HP (C.D. Cal., filed June 8, 1977).

[121] *PT&T* v. *MCI*, 649 F. 2d 1315 (9th Cir. 1981).

the Common Carrier Bureau on January 6, 1972, ARE GRANTED to the extent indicated herein and ARE DENIED in all other respects.

62. IT IS FURTHER ORDERED, That American Telephone and Telegraph Company SHALL PAY MCI Telecommunications Corporation $931,880.15 within thirty (30) days of the release date of this Memorandum Opinion and Order. This payment is contingent on the payment of $843,006.79 by MCI Telecommunications Corporation to The Pacific Telephone and Telegraph Company for amounts due from MCI under its Tariff FCC No. 126. PROVIDED, HOWEVER, that if American Telephone and Telegraph Company seeks reconsideration or judicial review of our Decision, IT MAY PAY MCI Telecommunications Corporation $931,880.15 as late as thirty (30) days after the forum which has jurisdiction to review this proceeding issues its mandate.

63. IT IS FURTHER ORDERED, That if The Pacific Telephone and Telegraph Company is awarded any prejudgment interest on the amount due it from MCI Telecommunications Corporation as a result of its suit to collect amounts due under Tariff 126, *PT&T* v. *MCI*, Case No. 77–2624-HP (C.D. Cal., filed June 8, 1977), American Telephone and Telegraph Company SHALL REIMBURSE MCI Telecommunications Corporation for the prejudgment interest which it pays to The Pacific Telephone and Telegraph Company.

64. IT IS FURTHER ORDERED, That the Motion for Expedited Disposition filed May 20, 1982, by The Pacific Telephone and Telegraph Company IS GRANTED, the complaint filed in this proceeding IS DISMISSED insofar as The Pacific Telephone and Telegraph Company is concerned, and the Motion to Strike the foregoing Motion for Expedited Disposition filed May 27, 1982 by MCI Telecommunications Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

FCC 81D–62

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of MCI TELECOMMUNICATIONS CORPORATION v. AMERICAN TELEPHONE AND TELEGRAPH COMPANY AND THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY and In the Matter of MCI TELECOMMUNICATIONS CORPORATION	CC Docket No. 81–217

Appearances

Ruth S. Baker-Battist, *William J. Potts* and *John M. Pelkey*, on behalf of MCI Telecommunications Corporation; *Alfred Winchell Whittaker*, *Hiram D. Gordon*, *M. Jean Dabney* and *Michael J. Goldey*, on behalf of American Telephone and Telegraph Company; *Robert Ralls*, on behalf of Pacific Telephone and Telegraph Company; *Louise L. M. Tucker*, *Bill Gerstenslager*, *Gay Ludington* and *Theodore D. Kramer*, on behalf of the Chief, Common Carrier Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH CHACHKIN

(Issued: November 25, 1981; Released: December 7, 1981)

Preliminary Statement

1. This case involves the formal complaint of MCI Telecommunications Corporation (MCI) filed September 22, 1976 against American Telephone and Telegraph Company (AT&T) and Pacific Telephone and Telegraph Company (PT&T). MCI seeks damages upon two distinct theories. The first relates to MCI's request for Telpak C circuits under AT&T's Tariff 260 and the second to the request for service under AT&T's Other Common Carrier Tariff FCC No. 266. On October 25, 1979, the Commission released its Memorandum Opinion and Order in which it denied MCI's complaint.[1] *MCI*

[1] The Commission also denied a petition for reconsideration and petition for stay of its Memorandum Opinion and Order in *MCI Telecommunications Corporation*, 62 FCC 2d 703 (1976). In that decision, the Commission denied MCI's "Petition for

Telecommunications Corporation v. *AT&T*, 74 FCC 2d 184 (1979). MCI sought judicial review of the 1979 decision in the United States Court of Appeals for the District of Columbia Circuit. Thereafter, on June 16, 1980, the Commission voluntarily requested the Court to remand the case to the Commission for "consideration of matters raised in MCI's brief which either were not addressed or were addressed inadequately in the order under review" Memorandum Opinion and Order released April 7, 1981, 85 FCC 2d 994 at 995 (Designation Order). The Court ordered the remand on September 2, 1980. On April 7, 1981, the Commission released its Designation Order herein.

2. The Commission specified that an expedited proceeding be held on the following issues:

(a) Whether AT&T's refusal to accept MCI's April 10, 1975 order of two bundles of Telpak C offerings from Oakland CA to Los Angeles, CA was unjust or unreasonable or otherwise in violation of Section 201(b) or 202(a) of the Communications Act;

(b) Whether, and if so, to what extent, AT&T's response to MCI's March 31 and April 8, 1975 orders for 116 voice grade circuits from Phoenix, AZ to Oakland, CA was unjust or unreasonable or otherwise unlawful under Sections 201(b) or 202(a) to the Communications Act; and

(c) What damages, if any, should be awarded to MCI for any unlawful acts or omissions of AT&T found under issues (a) and (b) above.

3. The initial prehearing conference was held on May 5, 1981. Further prehearing conference were held on June 4, 1981 and June 18, 1981. Hearings commenced on June 24, 1981 and continued through 9 hearing days until July 17, 1981, when the record was closed. Proposed findings of fact and conclusions were filed by the parties on August 24, 1981. Replies were filed by the parties on either August 31 or September 1, 1981. On September 21, 1981, MCI filed a motion to reopen the record. The motion was prompted by MCI's recent discovery of the existence of a June 22, 1972 memo from W. J. Schindele to R. T. Dugan. At that time, Schindele was an AT&T assistant vice-president for business relations and was in charge of relations with MCI and the other specialized carriers (Tr. 1712). The memo relates to a proposal by General Electric to interconnect a private microwave system to the CCSA network which AT&T was providing GE. The Schindele memo was clearly encompassed within the scope of Document Request No. 7 of MCI's First Set Of Document Requests. MCI's motion was granted at a hearing conference held on September 25, 1981. Further hearings were held on October 5 and 9, 1981. The record was reclosed on the

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Emergency Relief" in which MCI requested the Commission to order PT&T not to terminate service for nonpayment of past-due bills for private line circuits that MCI ordered between Oakland and Los Angeles to meet its commitment to General Motors.

latter date. Supplemental Proposed Findings and Conclusions were filed by the parties on October 21, 1981.

Findings Of Fact

A. *The 25 Week Issue*[2]

The GM Circuit Orders

4. In 1973, AT&T was providing General Motors (GM) a Common Control Switching Arrangement (CCSA), which was offered under AT&T's "private line" tariff, AT&T Tariff F.C.C. No. 260. CCSA is an arrangement which links together a customer's (*e.g.*, GM's) private line circuits between its various offices through switches located on the telephone company's premises. CCSA permits, at the customer's option, access to the public switched network. (Jt. Ex. 1, para. 1).

5. In 1973, the CCSA service provided to GM linked together GM offices in the following cities: New York, New York; Warren, Ohio; Detroit, Michigan; and Chicago, Illinois. In addition, GM had various private line (tie lines) from its midwest offices to its California offices in Fremont, South Gates, Van Nuys, and Goleta. (Jt. Ex. 1, para. 2).

6. In the fall of 1973, GM and AT&T discussed adding other locations including Oakland, California, to GM's CCSA service. By letter dated October 22, 1973, GM authorized AT&T to proceed with the addition of the "West Coast Switches" for the GM CCSA network. This included a CCSA switch to be provided GM by AT&T Long Lines or PT&T in Oakland. By letter dated December 28, 1973, AT&T proposed a June 1975 target date for cutover to the Oakland "West Coast Switches." (Jt. Ex. 1, para. 3). The GM Order involved, among other things, the following:

(a) 61 direct circuits between Oakland and Detroit.

(b) 85 direct circuit between Chicago and Oakland. (Jt. Ex. 1, para.).

7. In late 1973 and early 1974, AT&T initiated plans for providing those circuits. Those plans called for both the Chicago-Oakland and the Detroit-Oakland circuit to be routed over various facilities between the midwest and Oakland. None of those facility routes was planned to traverse Phoenix, Arizona or Los Angeles, California (Jt. Ex. 1, para. 4).

8. In October 1974, MCI contacted GM to explore the possibility of MCI providing service to GM, including the portion of the CCSA service at issue. MCI, in the beginning of November 1974 made a firm proposal to GM which included, *inter alia*, provision of CCSA trunks from Oakland to Detroit and Oakland to Chicago. The in-service date for those CCSA trunks, was proposed to be coincident with the cutover date (estimated to be early July 1975) for the

[2] For purposes of clarity, the evidence under this issue will be considered first.

Oakland CCSA switch to be provided by PT&T. From the outset, MCI contemplated that the CCSA trunks would be provided as follows: over existing MCI facilities from the midwest (Chicago and Detroit) to either Phoenix or Los Angeles and over AT&T or PT&T facilities between MCI's West Coast termination (Phoenix or Los Angeles) or the GM switch in Oakland. MCI preferred the Phoenix terminal to assure interstate rate treatment with respect to the facilities it obtained from AT&T and PT&T. (Jt. 1, para. 5). On February 25, 1975, GM gave MCI a firm order for, *inter alia*, the Chicago-Oakland and the Detroit-Oakland portion of GM's CCSA network. On March 12, 1975, GM cancelled its Order with AT&T for the Chicago-Oakland and the Detroit-Oakland portion of GM's CCSA network. (Jt. Ex. 1, para. 5).

9. In December, 1974 the MCI Circuit Engineering Department received two service orders from MCI Sales Department. The orders were for 15 voice-grade tie-lines between GM's Detroit CCSA switch and Oakland and for 60 voice-grade tie-lines between GM's Chicago CCSA switch and Oakland. The terminations at Oakland were to be at the new GM CCSA switch then being constructed. (MCI Ex. 7, p. 4, Tr. 855–856). At that time, MCI owned and operated facilities terminated at Phoenix, Arizona (Tr. 773–774). Pursuant to an agreement with Western Telecommunications, Inc., MCI had obtained the use of Broad Band intercity facilities between Phoenix and Los Angeles, California (Tr. 774–778). It had no arrangements whereby it could provide the service north of Los Angeles. Therefore, in order to provide the service to the GM Oakland CCSA switch, it was necessary to obtain facilities from the Bell System (Tr. 777). At the time this order was received, the Docket No. 20099 interconnection negotiations were being conducted and it appeared that such an order for service, in the quantities initially involved, would be capable of fulfillment under the new procedures being established (MCI Ex. 7, p. 4).

10. Prior to the placing with AT&T of the orders for facilities and services which are the subject of this proceeding, Hugh A. Knowles, MCI's CCSA engineering manager, had been involved in the furnishing of MCI service to GM's CCSA switches at Detroit and elsewhere. Those earlier orders antedated the implementation of the procedures agreed to in Docket No. 20099 and involved the Bell System only as to the local interconnection of MCI facilities with the GM CCSA switch on Bell System premises. AT&T was not called upon by MCI at that time to provide intercity connections between the MCI terminal and the CCSA switches. Prior to the implementation of the agreements in the Docket No. 20099, AT&T and its operating companies refused to provide intercity circuits that were not part of the Local Distribution Area (MCI Ex. 7, p. 3). The Local Distribution Area was an area around the city beyond which AT&T would not provide intercity circuits (Tr. 869–871). As a result of this

restriction, it was not possible for MCI to use AT&T facilities for providing intercity intermachine circuits to its customers (Tr. 870–871). One of the results of the settlement reached in Docket No. 20099 was the elimination of the Local Distribution Area restriction on AT&T facilities leased by other carriers. AT&T for the first time accepted orders from MCI for intercity facilities to serve MCI's customers (Tr. 853–855).

11. On March 31, 1975, Knowles sent to Weaver, AT&T's GM National Account Manager at Detroit, Michigan, an order for 116 voice-grade circuits between MCI's facilities at Phoenix and GM's CCSA switch to provide through service between GM's Oakland CCSA switches in Detroit and Chicago and the Oakland switch (MCI Ex. 7, p. 4). The letter stated that the request for circuits was made pursuant to the provisions of Tariff FCC No. 266 as modified in FCC Docket No. 20099 negotiations, *i.e.*, Settlement Agreement in FCC Docket No. 20099, dated March 13, 1975 (Jt. Ex. 1, para. 7). The sending of that written order followed, by a day or so, telephone conversations between Knowles and a person or persons on Weaver's staff at which time Knowles informed AT&T's employees that they were going to receive an order for 116 voice-grade circuits between Phoenix and Oakland (Tr. 779, 865–866). Knowles was not informed at that time that the 116 circuit order should not be placed with the Detroit GM National Account office (MCI Ex. 7, p. 5; Tr. 866).

12. On April 7, 1975, Weaver telephoned Knowles to inform him that his order of March 31, 1975 would not be accepted by the AT&T GM National Account team at Detroit and that such requests for intercity facilities should be channeled through the AT&T Long Lines Business Relations Group at Somerset, New Jersey (MCI Ex. 7, p. 5; Jt. Ex. 1, para. 8). Knowles was given the name of Donald G. Haynes, Staff Manager-Common Carrier Facility Leases, as the person to contact at Somerset (MCI Ex. 7, p. 5; Jt. Ex. 1, para. 8).

13. On April 8, 1975, Knowles telephoned the Somerset Business Relations Group and discussed with Haynes and/or Charles W. Bruton[3] the transfer of the GM Circuit order from the GM National Accounts office (MCI Ex. 7, p. 6; MCI Ex. 1, p. 1). Knowles was told to send the Business Relations Group a letter transmitting that order (MCI Ex. 7, p. 6; Tr. 358). Later the same day Knowles sent to Haynes a letter retransmitting the order for 116 voice-grade private lines circuits which would be used to provide intercity intermachine service between the existing GM CCSA switches at Detroit and Chicago and the new CCSA switch at Oakland. Knowles' letter of April 7, 1975 to Haynes was identical in content to his March 31, 1975 letter to Weaver (MCI Ex. 7, App. 3 and 4). Both letters

[3] Bruton worked in the business relations group and his responsibility was to implement OCC facility requests. He reported directly to Haynes (Tr. 347, 350). Haynes reported to Rolf Dalane who was Manager of Business Relations of Long Lines (Tr. 266–70).

transmitted order forms which directed that the GM CCSA Oakland terminations be extended via Los Angeles, California, to MCI's facilities at Phoenix, Arizona (MCI Ex. 7, App. 3 and 4).

14. Knowles' letter to Haynes of April 8, 1975 was received April 11, 1975 by Bruton (Tr. 358). Bruton proceeded to form a project team to process the MCI request (Tr. 361). In cases where orders were received by the Business Relations Group for intercity circuits in excess of seven, the sales person responsible for coordinating the completion of the order was instructed to follow a procedure known as the Intercompany Services Coordination System (ISC) (Tr. 361–362, 378). Under the ISC procedure, Bruton formed a Project Team of which he was Chairman (Tr. 362–363, 382). The ISC Project Team for the MCI 116 voice-grade circuits request consisted of 14 people including the following: a customer service engineer to support the AT&T sales unit; two facility engineers in the Cincinnati circuit design group; a Long Lines plant person responsible for the terminations in Oakland; a PT&T ISC special project coordination chairman in the Oakland area; facility engineers from the Western Area; Mountain Bell engineers responsible for the Phoenix end of the local facilities to go through MCI's location; members of the Detroit national accounts team to explain how many additional CCSA switch terminations would be needed in Chicago and Detroit and how the switches planned for Long Lines provision of service to GM would be used to fill the MCI order; and an AT&T Chicago CCSA switch customer team member (Tr. 390, 391, 392, 393).

15. Bruton initiated a conference call on April 16, 1981 to all the ISC project team members in which he advised everyone of MCI's due date of July 1. He requested the members of the team to analyze their specific jobs to determine whether or not they could meet the July 1 deadline. If not, they were to determine what time interval was necessary to provide the facilities to MCI (Tr. 382). It was agreed that another conference call would be held on April 18 with the same team members (Tr. 382). During the project team call on April 18, 1975 Bruton was informed that 46 circuits could be made available by July 1, 1975 and that it would take 25 weeks to provide all 116 Phoenix-Los Angeles-Oakland circuits (MCI Ex. 2).

16. On April 18, 1975 Bruton telephoned Knowles and advised that it would require 25 weeks to complete the order, but that 46 circuits, of which 30 would have two or three links could be available between Phoenix and Oakland by the July 1, 1975 target date (MCI Ex. 2, MCI Ex. 7, pp. 7–8, Tr. 407, 408). It is conceded that the 30 circuits with two or three links would not be technically suitable for the GM Oakland CCSA requirement (MCI Ex. 7, p. 8; Jt. Ex. 1, Para. 11; Tr. 409, 800–801). In mid-April, 1975, AT&T also located four additional direct channel groups (48 circuits) between Oakland and Phoenix. AT&T estimated that it would require 16 weeks to make

each of those four channel groups available for service (Jt. Ex. 1, Para. 12).[4] No further steps were taken by AT&T to process MCI's request for 116 circuits between Phoenix and Oakland because a final delivery date was not agreed upon (Tr. 414).

17. Knowles discussed the subject of expedition with Haynes in a telephone conversation which took place on or after April 18, 1975, and was told that even if MCI requested expedition of the order, it did not look likely that all 116 circuits could be supplied by the July 1, 1975 target date (Tr. 797–798). Haynes told Knowles that it would take an additional two weeks to determine whether expedition by July 1, 1975 was possible (Tr. 798). After the April 18 telephone call, Bruton tries unsuccessfully to contact Knowles. His telephone calls to Knowles were not returned and he was unable to clarify or confirm the components of the MCI facilities request (Tr. 415). By letter dated May 1, 1975, MCI cancelled its March 31, 1975 and April 8, 1975 orders to AT&T Long Lines for the original 116 circuits (Jt. Ex. 1, para. 3).

18. Following Knowles' telephone conversations with Haynes and Bruton and AT&T's rejection on April 21, 1975 of MCI's order for two Telpak C services[5], MCI turned to PT&T for service (Tr. 813–814). On April 23, 1975, MCI ordered 118 circuits between PT&T's "Oakland CCSA switch" and the "MCI office in Los Angeles" to be provided on or about July 13, 1975. PT&T provided these facilities by the required date[6] and pursuant to PT&T Tariff FCC No. 126, *i.e.*, PT&T's facilities tariff as modified pursuant to the Docket No. 20099 Settlement Agreement (Jt. Ex. 1, para. 18).

Role Of Western Area Engineering Department

19. In April, 1975, Myron Lambert was employed as District Engineer of the AT&T Long Lines Department Western Area Engineering Department at San Francisco, California (Tr. 433–434). Lambert supervised a staff of about sixty people. The responsibilities of his group included the forecasting of the number of message trunks necessary to provide message telephone service in the Western Area, the planning of the annual facility construction programs necessary to provide message and private line services,

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[4] Bruton could not recall whether or when he had been informed by Western engineering that an additional 48 circuits could be made available in the 16 week interval (Tr. 406–407). He thinks that he was so informed after April 18 and that he tried unsuccessfully to inform Knowles of the fact (Tr. 407). Knowles testified that Bruton told him on April 18 that 24 additional circuits would be made available a few weeks after July 1, 1975 (MCI Ex. 7, p. 8) but there is no indication in the record that he was ever informed about the 48 circuits.

[5] AT&T's rejection of MCI's order for Telpak service is discussed, *infra*.

[6] PT&T found 118 activated and available spare circuits between Los Angeles and Oakland. These circuits were on already established PT&T Los Angeles - Oakland channel groups scattered over three different radio routes (Tr. 706).

and the preparation of the paperwork necessary for Section 214 construction applications to be filed with the Commission (Tr. 435).

20. Dick Cullen and Don Koch, two of Lambert's subordinates in the Western Engineering Center, were informed by AT&T personnel in Chicago on April 4, 1975 that an order would be received from MCI for a large number of circuits (Tr. 436–437, 439). Koch decided on the basis of that report that the matter was serious enough to warrant spending some extra research time on it and he authorized one of the people in his group to work overtime on the matter (Tr. 441). Lambert first heard about the MCI order for a significant number of voice-grade circuits when he was briefed by Cullen and Koch on Monday, April 7 or Tuesday, April 8, 1975 (Tr. 435). They brought the matter to Lambert's attention because of the number of circuits involved and Lambert testified that, on the basis of the research which they had done since April 4, 1975, "it appeared that we would have trouble meeting that facility request and meeting the requested service date." (Tr. 437). Lambert discussed with his subordinates their capability to provide the MCI requested service, and the reasons why Cullen and Koch thought they would be unable to meet the requested starting date. They reviewed with Lambert some preliminary research work which they had conducted over the weekend. Lambert concluded that his staff had done ". . . a fairly thorough job of researching." It was decided by Lambert and his subordinates to let the matter stand at that point pending receipt of what Lambert termed a "legitimate" facility inquiry or order (Tr. 439–440).

21. Cullen and Koch informed Lambert during the briefing early in the week of April 6, 1975, that the result of some individual circuit searches showed the availability of 16 direct circuits and 30 indirect circuits. They reported to Lambert that the AT&T Long Lines Department Engineering Bureau of Cincinnati, Ohio, had already done a similar study and had reached about the same conclusions as had Lambert's staff (Tr. 440–441). They found that the 16 direct circuits could be routed on a direct Phoenix to Oakland Master Group on some individual spare circuit slots which were available on those channel groups. They also found that the 30 indirect circuits available were routed to various intermediate offices, brought down to voice level at those intermediate offices, and ultimately routed from Phoenix to Oakland through those intermediate offices (Tr. 449–450).[7] The 30 indirect circuits plus the 16 direct circuits could have been made available for a July 1, 1975 start up (Tr. 454–455).

22. Koch and Cullen continued to work on the MCI-GM circuit

[7] More than one voice-grade connection per circuit was unacceptable to both AT&T and MCI (Tr. 800; Jt. Ex. 1, para. 11).

inquiry between April 8 and April 18, 1975. Looking for alternatives, they discovered on or about April 13, 1975, that two Super Group[8] slots were available between Phoenix and Los Angeles which could be connected to two Super Group slots between Los Angeles and Oakland (Tr. 452, 461). That fact was determined from Facility Planning documents (Tr. 461).[9] In 1975 the task of connecting Super Group facilities at the Los Angeles office was a Western Electric Company responsibility (Tr. 522–523). The 25 week normal interval which was quoted involved an assessment of how the two Super Group slots were configured and what Western Electric work would be required (Tr. 456, 460).[10]

AT&T's Basis For Quoting A Normal Interval Of 25 Weeks

23. AT&T quoted MCI a 25 week interval for providing all of the 116 voice grade circuits from Phoenix to Oakland ordered on March 31, 1975. The 25 week interval quoted was based on the general knowledge and experience of Lambert's engineering department (Tr. 677). In 1976, AT&T prepared a document entitled "Normal Interval[11] Components Customer Order To Customer Service" (MCI Ex. 6) to explain the components of the various intervals totalling 25 weeks had MCI's order been processed (Tr. 497). Lambert considered the schedule ambitious since the 25 week interval calls for compressing some of the components. For example, the Western Electric activities are normally a 20 week interval rather than the 14 - 15 weeks quoted. In addition, activity 9 is more than two weeks and activity 4 calls for 11 weeks rather than the 8 weeks shown (Tr. 678–679).

24. The 25 week time line consists of twelve different parts, each of which is designed to encompass separate activities. Certain of these activities are shown to be performed concurrently with others

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[8] A "voice-grade circuit" occupies 4 kilo-Hertz of spectrum (Tr. 440). A "Group" or "Channel Group" consists of 12 circuits (Tr. 446–447, 453). There are 60 circuits in a "Super Group" and 600 circuits in a "Master Group" (Tr. 446).

[9] There was also a possible availability of two channel groups which could be established on a direct Phoenix to Oakland carrier facility and two channel groups on the indirect route between Phoenix and Oakland on facilities that went through Wolf Creek, California (Tr. 452). A 16 week normal interval was considered reasonable to establish these facilities (Tr. 456).

[10] Lambert's group did not investigate the possibility of meeting MCI's order by taking 116 voice circuits from Phoenix to Los Angeles, bringing them down to voice level at Los Angeles and putting them on a back to back arrangement with another 116 circuits from Los Angeles to Oakland, thereby providing two tandem voice links for one basic circuit (Tr. 688). Lambert considered such a proposal inefficient and uneconomic and one that would tie up too much equipment (Tr. 688). In his view, the preferred engineering practice was to put up co-terminal channel groups and/or supergroups to handle a large volume of circuits (Tr. 636).

[11] Normal interval is used in an engineering context and means following regular engineering procedures. It uses regular in-basket and correspondence practices and makes intelligent selection of work projects. It does not contemplate extraordinary efforts such as handcarrying documents or dropping everything else to start on a particular job (Tr. 694).

while other activities are shown to be performed consecutively. Lambert testified with respect to the entire 25 week interval as shown on MCI Exhibit 6. In addition, Louis Mahoney was presented as an expert on the subject of Western Electric's involvement and testified with regard to the details of the Western Electric components of the 25 week interval (Activities 4–6) which aggregate 14 to 15 weeks in the AT&T time line (MCI Ex. 6).

25. *Activity 1.* The first step is the Order itself. A telephone company sales person negotiates with the customer and all the Bell groups involved in providing the service. These groups give estimates of the length of time it will take to do their part of the service. The sales person deals directly with the customer. Then a mutually agreeable date is selected, a firm order or Uniform System Service Order ("USSO") is issued by the sales department to the divisions within the Bell Group. One week is allotted for this activity. Testimony reflected that an expedited order could have been prepared in four days (Tr. 507, 511, 679).

26. *Activity 2.* A total of three weeks is allotted for this step in the process. The firm order is received by the facility engineers. These engineers must analyze the order for requirements. They check to see what spare facilities exist anywhere in the network which can be used in filling the order. They review carrier records to determine where new facilities (channel groups or supergroups) can be built. They review all terminal equipment needed to fill the order and determine and authorize the engineering equipment which must be ordered from and installed by Western Electric. As a result of their analysis, they prepare a facility project, a form of written order. A significant amount of written work is required for the facility engineers to complete this step. This activity might have been expedited to two weeks (Tr. 509, 511, 512, 513, 679 and 710).

27. *Activity 3–6.* Generally activities 3 through 6 were the specific engineering components done by Western Electric. In 1975 Long Lines normally contracted with Western Electric (WECO) to run coaxial cables to supergroup (60 circuits) connectors. The MCI Order would have required coaxial cable to interconnect the two spare supergroup connectors that were in Los Angeles (Tr. 513, 517, 518–523).

28. Two to three weeks were allotted to *Activity 3* itself (Tr. 557) which included the Long Lines equipment engineering steps that were a prerequisite to WECO involvement. The engineers would make arrangements for the cable hook-up including soldering of wires. They would also prepare a schematic and determine the estimated cost, ownership of the equipment, the accounts to which the expeditures would be distributed and the specific aisle and bay location in the telephone company office where the circuit equipment would be installed and activated (Tr. 549, 550, 555, 557).

Testimony showed that this step might have been expedited to one week (Tr. 680 and 711). A Long Lines job order would result.

29. *Activity 4* describes eight weeks of Western Electric activity. WECO would receive the Long Lines job order and analyze it. A WECO engineer would check his own records to determine the specific location in the telephone office building where the new circuits to fill the order will be prepared. The specific length and location of cable runs between the components of the equipment is determined. An order is then sent to a WECO distributing house or factory. A Bell System Practice (BSP 001–815–700) shows the standard interval published by WECO to perform this detailed engineering function is eight weeks. At the end of the eight weeks the necessary documents are sent to the installation forces who ultimately do the work (Tr. 552, 564, 566, 567). The testimony showed that this eight week period could not be shortened by expedition (Tr. 680).

30. *Activity 5.* Two to three weeks were allotted for the order, putting it on a truck, time-in-transit, and having it received and stored in the telephone company building (Tr. 572). This time could not be shortened by expedition (Tr. 680 and 711).

31. *Activity 6.* One week is specified for the actual installation by Western Electric, scheduled by determining the available work force. In the MCI case, WECO would have installed eight pieces of 724 cable of different lengths to connect the supergroups in the Los Angeles office (Tr. 573, 577). Then the installer would perform certain tests on the equipment (MCI Ex. 7, p. 2). The time required by this step could not be reduced by expedition (Tr. 680 and 711).

32. *Activity 7.* Telephone company plant crews perform tests on the WECO installed equipment to be certain that it works harmoniously with the rest of the office equipment. One week was allocated for this testing (Tr. 577).

33. *Activity 8* describes the work done by the telephone company group which works on the carrier equipment once it receives the detailed circuit design prepared by the AT&T circuit design group in Cincinnati. The specific circuits (channel groups and supergroups) would be assigned within the telephone company office. Various carrier transmission tests would be performed (Tr. 578–579). Some of this work could be started while the previous work in Activity 7 was being done provided the circuits design from the Cincinnati group had been received (Tr. 590). One week was allocated for this work, but expedition might reduce activity 7 and 8 to one week total (Tr. 681 and 711).

34. *Activity 9.* The next step in filling the MCI order is the private line testing by plant groups within the telephone office of each individual circuit. This includes checking terminal equipment and performing dialing tests on the CCSA intermachine trunks. This work could be started as soon as the circuit design order is received

from the Cincinnati group but not completed until Activity 8 is finished (Tr. 589, 591). Two weeks are allotted for this work (MCI Ex. 7, p. 4).

35. *Activity 10* describes the actual work done by the Cincinnati circuit design group and takes 4 weeks. Their work involves checking circuits and equipment existing throughout the network as it appears in their computer data base records. The circuit design engineers then prepare a document called an advance circuit order layout information which is uniquely geared to the Pacific Telephone and Telegraph Co. to alert them to the impending work. They also prepare a regular facility order layout record to distribute to the appropriate offices. Testimony showed that this activity could possibly be reduced to two weeks on an expedited basis (Tr. 618, 620, 721).

36. *Activity 11* is a four week period of time allocated to PT&T in which PT&T analyzes the work from Cincinnati. Testimony indicated that because this was a unique interconnection with an OCC, the circuit design for the intermachine trunks would be somewhat different than the standard Bell design. Therefore, it had to go through PT&T's own computerized system. It would take four weeks for PT&T to do this work even on an expedited basis (Tr. 625, 628, 629, 630).

37. *Activity 12.* Two weeks are allocated for the PT&T circuit bureau to issue circuit order cards to the plant office (MCI Ex. 6).

38. In sum, the testimony showed that AT&T must perform certain steps within its system in order to provide circuits service to a customer when no spare facilities exist. No evidence was introduced to demonstrate industry standards other than the Bell System standards.

B. *Telpak Issue*

39. On April 10, 1975, Knowles, at the direction of an MCI attorney, Laurence E. Harris, mailed a letter to Haynes at the AT&T Long Lines office at Somerset, New Jersey, in which he ordered two Telpak C services under AT&T Tariff No. 260 between Oakland and Los Angeles (MCI Ex. 7, p. 6; Jt. Ex. 1, para. 14).[12] His letter to Haynes read in part as follows (Jt. Ex. 1, para. 14):

> Please provide two (2) Telpak C services from the General Motors Corporation CCSA Switch in Oakland, California to an MCI provided switch on General Motors premises located in MCI Telecommunications Corporation, 666 West Los Angeles Street, Los Angeles, California.
>
> Termination specifications are to be per the attached MCI orders. MCI is ordering as agent for General Motors.

[12] Dalane conceded that the 20999 settlement agreement did not preclude OCCs from ordering services, rather than facilities (Tr. 293–294).

40. The purpose of Knowles' order was to provide an alternative means of obtaining Bell System facilities or services to meet the July 1, 1975 target date for service to GM's Oakland CCSA switch (Tr. 781).[13] Since each Telpak C service had a voice-grade equivalency of 60 circuits, two such services would have provided more than a sufficient number of voice-grade circuits to meet GM's Oakland requirement (Tr. 781). There is no physical or technical difference between a Telpak circuit and a private line circuit (Tr. 849–850).

41. On November 25, 1974, GM wrote a letter indicating that MCI was acting as its agent for the purpose of ordering telecommunications service. The letter did not discuss the financial arrangement between MCI and GM. The letter authorizes MCI to order changes, additions, removals, rearrangements and other modifications to specific telecommunications services provided to General Motors by other carriers. The authorization was stated to remain in effect until the addressees were otherwise notified (Jt. Ex. 1, Doc. No. 8).[14] At the time of the April 10, 1975 order to AT&T for two Telpak C services, GM did not lease premises from MCI at the 666 West Los Angeles Street address referred to in Knowles letter (Tr. 803–804) and Knowles was unaware that MCI had at any other time ordered services from AT&T as agent for GM (Tr. 801–802). It was MCI's intention to lease to GM facilities in MCI's building in Los Angeles in order to meet the "customer's premises" requirement of AT&T Tariff FCC No. 260 (Tr. 867–868). The Oakland GM CCSA switch was in the AT&T central office and not on GM's premises (MCI Ex. 7, p. 6; Tr. 868–869).

42. On April 15, 1975, Knowles received a call from Haynes who advised him that MCI's request for two Telpak C services from Los Angeles to Oakland was going to be denied on the ground that the request would violate the "customer's premises" restriction in the applicable AT&T tariff.[15] Haynes sent Knowles a letter dated April 15, 1975, confirming the refusal to provide Telpak services (MCI Ex. 7, p. 7; Jt. Ex. 1, Item 16, Doc. 9). Haynes' letter to Knowles of April 15, 1975, contained a suggestion that Knowles should go back to Weaver, the GM National Account Manager, regarding the ordering of private line services (Jt. Ex. 1, Item 16, Doc. 9). Knowles did not reorder Telpak services from the GM/NAM group (Tr. 783). AT&T is not contending that, had Knowles followed Haynes' advice and

[13] At this time Knowles had not yet been advised that Long Lines would be unable to meet MCI's request for facilities under Tariff 266 (Tr. 780).

[14] The addressees were PT&T, a Bell subsidiary, General Telephone Company of California, and Mountain Telephone and Telegraph Company (Jt. Ex. 1, Doc. No. 8).

[15] Unlike the order for service under Tariff 266, facilities existed to furnish the service under Telpak. AT&T had available 116 spare circuits from Los Angeles to Oakland. In fact, PT&T provided service in that manner to MCI (Tr. 150, 706). AT&T does not claim it did not have the facilities to furnish Telpak to MCI (Tr. 1508–1509).

reordered the two Telpak C services from Weaver's group, AT&T would have agreed to provide the services (Tr. 783).

43. Haynes' supervisor at AT&T, Rolf Dalane was also informed of MCI's order for Telpak circuits between Los Angeles and Oakland. This information came from Walter Kelley, Director of Operations for Long Lines (Tr. 271, 278). On April 21, 1975, Kelley Told Dalane that Larry Harris of MCI had called him to determine whether AT&T would provide Telpak circuits to MCI (Tr. 272). Kelley requested that Dalane review the question and develop a response to Harris (Tr. 272). At approximately 9:10 on that same morning, Dalane telephoned Harris (MCI Ex. 1). Dalane informed Harris that Kelley had asked Dalane to look into the MCI request for Telpak circuits and that Dalane expected to get back to Harris either that day or the following day with an answer whether AT&T would provide Telpak to MCI. Subsequent to that conversation, Dalane spoke with Paul Muench, an AT&T employee whose office was located in AT&T's headquarters at 195 Broadway, and Lee Cutcliff, an attorney with Long Lines (Tr. 313). Both Muench and Cutcliff had been actively involved in the Docket No. 20099 negotiations (Tr. 313). Dalane recommended to Muench and Cutcliff that AT&T refuse Telpak service to MCI because MCI's request was "outside the scope of [AT&T's] tariffs" (MCI Ex. 1). Muench and Cutcliff concurred in Dalane's recommendation but suggested that Dalane confer with Schindele, AT&T's Assistant Vice President for business relations matters, and Kelley prior to responding to Harris. (MCI Ex. 1; Tr. 313). Later that afternoon, Hugh Rails and Jim Corbert, of AT&T's Detroit Sales Office, met with Dalane. (MCI Ex. 1). Rails had contacted Dale Thurman of GM about the premises at 666 West Los Angeles Street in Los Angeles, California. (MCI Ex. 1). Rails was informed that GM did not own or lease space at 666 West Los Angeles Street and that GM did not have a need for switching equipment at that location. (MCI Ex. 1).

44. The following day, i.e., April 22, 1975 Dalane recommended to Kelley that AT&T refuse to provide Telpak circuits to MCI (MCI Ex. 1; Tr. 273). Dalane made this recommendation because the request "clearly did not involve any termination in Los Angeles at a GM premise." (Tr. 275, 11. 15–17). Kelley and Schindele concurred in this recommendation (MCI Ex. 1). Thus, at 11:35 a.m., on April 22, 1975, Dalane telephoned Harris and informed him that AT&T would not provide the requested Telpak circuits to MCI (MCI Ex. 1). At no point in his telephone conversation with Harris did Dalane claim that the resale restriction in Tariff No. 260 was the reason for AT&T's refusal to make Telpak circuits available to MCI (Tr. 1039).[16] That afternoon, Dale contacted Patton of AT&T's Detroit Sales

[16] In fact, Dalane is unclear whether the question of the applicability of the resale restriction ever surfaced in his conversations with Harris (Tr. 1040).

Office, to inform him that AT&T was refusing to provide Telpak circuits to MCI (MCI Ex. 1, p. 2; Tr. 316).

The Customer Premises Restriction

45. AT&T refused to provide Telpak to MCI because of the existence in the AT&T tariff of a restriction whereby AT&T would not provide private line service between two locations unless the party ordering the service maintained premises at both locations and had a regular and continuing requirement to originate and terminate communications at each location (Tr. 276). This restriction, known as the customer premises restriction, was included in Section 2.6.3 of AT&T's Tariff FCC No. 260 (Jt. Ex. 1, Docket No. 10, § 2.6.3; Tr. 200). Pursuant to the customer premises restriction, AT&T would not provide private line service between Cities A and B if the potential customer wished to provide its own communications system between Cities B and C, and City B was merely to be used to connect the AT&T line with the customer's own system (Tr. 205–206). Similarly, AT&T would not provide the circuit between Cities A and B if that circuit were merely to be connected at City B to the circuit of another common carrier between Cities B and C (Tr. 206).

46. According to Howard Nutter,[17] the customer premises restriction was necessary for two reasons: First, AT&T was concerned that a customer might build its own system over a low-cost route and request only the high-cost route from AT&T, with the result that the policy of nationwide average pricing might be upset (Tr. 237).[18] Second, to permit termination of an AT&T circuit at some place other than premises where the customer had a regular and continuing need to originate or terminate communications would deprive AT&T of end-to-end service responsibility (Tr. 237).

47. The customer premises restriction made no distinction between high-cost and low-cost routes. Thus, the customer premises restriction would not permit provision of an AT&T private line to a switch that was not located on a customers' premises even if a non-AT&T carrier were to be providing service over a route which was a higher-cost route when compared to the circuit sought from AT&T (Tr. 239–240). Moreover, the special construction provision of FCC Tariff No. 260 could be used if the customer were requiring AT&T to construct a costly facility between two cities with the intent to

[17] In 1975, Nutter was Division Manager in the Tariff and Cost Department in AT&T's headquarters at 195 Broadway, New York City (Tr. 199). Nutter participated in drafting the customer premises restriction and had limited responsibility for enforcing that provision (Tr. 201). Nutter, however, did not advise Dalane in determining whether MCI's order for Telpak would violate the customer premises restriction (Tr. 256–257).

[18] There would be no economic harm from terminating a circuit at a switch rather than a customer's premises since there is no significant difference in the cost of providing the two types of termination (Tr. 242–245).

connect that facility to an OCC circuit or private microwave system (Tr. 260).[19] In addition, AT&T has presented no evidence demonstrating economic harm to itself or the public if it were to de-average its prices.

48. If a customer had a need to initiate or terminate communications in three different Cities, A, B and C, the customer premises restriction would not have prevented AT&T from providing circuits between Cities A and B, even if the customer were to obtain circuits between cities B and C either from an OCC or through the use of private microwave (Tr. 241–242). Under such circumstances, AT&T would not have end-to-end responsibility (Tr. 259).

49. Nutter testified that a circuit might not work properly unless AT&T maintained end-to-end responsibility over the entire circuit (Tr. 251). Nutter admitted there are no technical studies which would substantiate that statement (Tr. 258), or which demonstrated any technical (*i.e.*, engineering) harm to the AT&T network in the absence of the customer premises restriction (Tr. 238–239).

50. AT&T's Tariff FCC No. 260 contained a number of exceptions to the customer premises restriction whereby AT&T would provide circuits to certain entities even though those circuits would not be terminated at the customers' premises. AT&T would provide service to the International Record Carriers and terminate that service at any one of five "Gateway" Cities in the United States, even though the ultimate customer (*i.e.*, the IRC's customer) had no premises in that city. Rather, the AT&T service terminated at a switch where the AT&T service was connected to the IRC's overseas circuits (Tr. 207–208). Similarly, FCC Tariff No. 260 permitted the provision of service to an IRC's data message switcher in order to permit the IRC to connect to AIRCON, PLC or ARX service (Tr. 209).[20] This exception also permitted incidental use for connection to other domestic services provided by other carriers (Tr. 210). AT&T would also have provided service to a switch, even if that switch were not located at a customers premises, if the switching equipment were owned by a composite data service vendor and were used for the switching of data messages. Regardless of whether termination were to take place at the customers' premises, AT&T would provide service to the United States Air Force and NASA if the head of those

[19] Similarly, the special construction provision was available in the case of "churning." "Churning" is described by Nutter as a situation in which a customer requests AT&T to provide service at a point where there was no communication requirement, such as the foot of a microwave tower and then terminates the service after constructing its own system (Tr. 250).

[20] AIRCON, PLC and ARX were the names of computerized message switching services provided by RCA Global Communications, Inc., Western Union International and ITT World Communications, Inc., respectively. These services permitted customers to share the use of computers to switch data and telegraph services. See *American Telephone and Telegraph Company*, 60 FCC 2d. 929, 940 (1976).

organizations requested such service and if the connecting arrangements were provided by the telephone company (Tr. 218–221).

51. Moreover, there was no requirement under FCC Tariff No. 260 that AT&T connect with an independent telephone company, such as the Lincoln Telephone and Telegraph Company, at a customer's premise. Rather, those two companies provided a through service from the customer's premises in the independent company's city to the customer's premises in the AT&T city (Tr. 226–27, 229). Interconnection between Lincoln and AT&T would merely take place at some agreed-upon point between the two cities (Tr. 224, 230).

52. In like manner, interconnection between AT&T and a Bell System Operating Company need not have taken place at the customer's premises. Interconnection could have taken place at a variety of points between the two end cities (Tr. 231). The customer premises restriction would be satisfied merely by the termination of the jointly provided service at customer's premises in both of the end cities (Tr. 231).

53. AT&T created another exception to the customer premises' restriction inasmuch as AT&T provided service between a customer's microwave system and that customer's premises (Tr. 232). This exception, known as the "entrance facility" exception, was limited to the extent that AT&T would only provide a voice grade circuit of 25 miles or less in length for use of an entrance facility (Tr. 232).

54. AT&T would also have provided service between Oakland and a Los Angeles CCSA switch even if that switch were connected with either a private microwave system or an OCC circuit between Los Angeles and Phoenix (Tr. 218). CCSA switches are generally not located at the customer's premise, but are placed at the telephone company office (Tr. 217–218).

55. AT&T officials recognized, three years prior to MCI's request for Telpak, that the economic argument for retaining the restrictions against piece-out may not be supportable. On June 22, 1972, W. J. Schindele signed and forwarded a memo to R. T. Dugan (MCI. Ex. 12). At that time Schindele was an AT&T assistant vice-president for business relations (Tr. 1712). In that capacity, Schindele was in charge of relations with MCI and the other specialized carriers (Tr. 1712). The Schindele memo came about as a result of discussions at AT&T regarding AT&T's response to the request of General Electric (GE) to interconnect facilities owned by GE with certain services offered by AT&T (Tr. 1713). As part of these discussions, Dugan, an AT&T Assistant Vice President, solicited suggestions from 10 or 12 of AT&T's assistant vice-presidents, including Schindele (Tr. 1713–1714). The June 22, 1972 memo is Schindele's response (Tr. 1714).

56. In the course of his memo, Schindele, who was responsible for relations with MCI and Western Union, suggested that AT&T should clarify its tariff as to what constitutes a customer's premises. Schindele explained that this was necessary because:

> Unless this is done, customers will lease space for their switches at carrier premises. Ultimately we will be faced with the question of allowing another carrier to perform the switching function and if we allow a customer to place his switches at a carrier's premises, we will be hard pressed not to allow the carrier to switch there. The result will be our terminating Bell Services at Western Union and MCI offices. (MCI Ex. 12, p. 1).

57. With respect to the question whether AT&T should provide a non-switched connection between customer provided facilities and AT&T services, Schindele suggested that if such a connection were provided to GE, AT&T would ultimately be forced to allow carriers to make the same connection (MCI Ex. 12, p. 2). Schindele recommended the "development of a rational economic argument in favor of keeping the piece-out restrictions" (MCI Ex. 12, p. 3).[21]

> It appears that now is an appropriate time for the development of a rational economic arguement [sic] in favor of keeping the piece-out restrictions. Even assuming that we cannot successfully defend this position, at this point there isn't very much we can lose in defending it. In short, this is the entire piece-out provision which we are considering giving up, and if it is possible to stop it, or at least delay it, then we should attempt to do so

58. James Groves, a subordinate of Schindele, was the author of the Schindele memo (Tr. 1556). Normally, Schindele would review a draft of any memorandum that was to bear his signature and would discuss the draft with the author (Tr. 1563). Groves believes he followed the normal practice and discussed the memo with Schindele (Tr. 1571). Schindele did not suggest any changes in the draft (Tr. 1563). Groves described the memo as a "rather cut and dried request" involving the piece-out regulations in the tariff (Tr. 1571). He wanted to remind Dugan that if AT&T granted GE's interconnection request, it would be difficult to deny a similar request made by a common carrier (Tr. 1572). It is Groves' belief that the customer premises restriction is reasonable and that piece-out would have a detrimental effect on the network technically and would adversely impact the rate structure. He believed that even if AT&T couldn't convincingly articulate its rationale, it should not back away from the restrictions (Tr. 1559–1560, 1582). Groves has no economic background (Tr. 1564). Prior to writing the memo, he did not review any study which addressed economic arguments in favor of keeping restrictions against piece-out (Tr. 1578). Groves did not consider any alternative means of protecting the public interest (Tr. 1565–1566).

59. F. Mark Garlinghouse, who was the AT&T vice-president in charge of the state regulatory department in 1972, was Schindele's direct supervisor (Tr. 1711–1712). He received a copy of the Schindele memorandum at the time it was prepared (Tr. 1713). In Garling-

[21] Schindele was not called as a witness. The Bureau initially intended to call him but decided against it after discussions with him. The Bureau concluded his testimony would not add anything to the record of any significance other than the fact that he signed the document (Tr. 1709–1710).

house's opinion, the Schindele memorandum did not state policy for AT&T because Schindele was not in a position to do that (Tr. 1712–1713). Garlinghouse considered the language in the memorandum concerning the development of a rational economic argument unfortunate. According to Garlinghouse, Schindele was familiar with the fact that Bell had economies of scale in its intercity facilities (Tr. 1714). He interpreted Schindele's memorandum to mean there was a need to quantify in dollars and cents the impact of piece-out (Tr. 1787, 1802–1803). Schindele's memorandum was not presented to the AT&T executive policy committee although the overall recommendations of the assistant vice-presidents and others were presented (Tr. 1715). The executive policy committee eventually denied GE's request (Tr. 1720, 1722).

60. Garlinghouse testified that whenever there are differences in costs on any two routes and where that difference is accompanied by national average pricing, cream skimming is possible and almost inevitable (Tr. 1759). Garlinghouse further stated that the Commission in 1972 required nationwide average pricing (Tr. 1759). Garlinghouse, however, could not cite any Commission decision requiring nationwide average pricing (Tr. 1762). The Commission stated in its 1971 *Specialized Carrier* decision:[22] "Whereas services may be in direct competition, departure from uniform nationwide pricing practices may be in order, and as such, will not be opposed by the Commission" (Tr. 1763). Garlinghouse also stated that AT&T's Council of Economic Advisors informed AT&T management in 1972 that the elimination of the customer premises restriction would lead to cream skimming (Tr. 1718, 1766). However, the minutes of the meeting of the Council of Economic Advisors at which the customer premises restriction was discussed does not support Garlinghouse' contention. The minutes state:

> Best economic answer to Ge claims would be to change our pricing so as to price on basis of costs on each route. If this were done, there would be no reason to refuse interconnection because each piece we furnish to GE would be profitable and GE would have no motivation to furnish any part of the system unless their costs were, in fact, lower than ours. In other words, there could be no cream skimming.
>
> What is important to determine is what our various costs are and how they compare to someone like GE or MCI. This will be necessary in order to prove cream skimming.
>
> There is no economic justification for refusing to piece-out if each of the elements (trunks, access lines, terminals, etc.) of the system is priced properly. The exception to this would be if a competitor's presence imposes additional costs that our customers have to bear but not their customers.
>
> If we try to go to route pricing and the FCC won't permit us to do so, then we have

[22] *Specialized Common Carrier Services*, 29 FCC 2d 870, 914–15 (1971), reconsideration denied, 31 FCC 2d 1106 (1971), *aff'd sub nom., Washington Utilities and Transporation Commission* v. *FCC*, 513 F.2d 1142 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975).

a strong argument that entry of GE and others should be restricted in order to protect national average pricing against cream skimming.

If we don't at least try to go to route pricing, we have a weaker argument in that we must say that national average pricing is good and in order to protect it, we must bar entry by GE and others. This is further weakened by the FCC statement in the MCI case to the effect that Bell may need to abandon nationwide pricing (which we have not yet tried to do).

(MCI Ex. 13, p. 1).

Notwithstanding the advice of its Council given in 1971, Bell did not conduct any studies as of April 1975, the date of the Telpak request, quantifying the impact if the piece-out restrictions in Tariff 260 were removed (Tr. 1782–1787).[23]

The Resale and Use Restrictions

61. In the course of his testimony in this proceeding. Dalane stated that AT&T could not have provided Telpak to MCI in 1975 because of the existence of the resale restriction in Tariff No. 260 (Tr. 278).[24] This restriction stated: (Jt. Ex. 1, para. 16):

Private line service shall not be used for any purpose for which a payment or other compensation shall be received by either the customer or any authorized or joint user, or in the collection, transmission, or delivery or any communications for others . . . .

Essentially, the resale restriction meant that AT&T would refuse to provide service to a customer because that customer was not the ultimate user of the service (Tr. 300).

62. The use restrictions of AT&T Tariff FCC No. 260 complemented the resale restriction (Tr. 281). Those restrictions limited the purposes for which the services included in Tariff FCC No. 260, such as Telpak, could be used (Tr. 279). The purpose of the use restrictions was to ensure that such services could not be resold (Tr. 281, 284).

63. Generally, Tariff No. 260 services could be used for "the transmission of communications to or from the customer and relating directly to the customer's business." (Tr. 283, 11. 10–12) Dalane testified, however, that MCI's resale of Telpak would not comply with this use provision because the communications which would be placed over the Telpak circuits would be the communications of MCI's customers rather than of MCI itself (Tr. 288). AT&T would make Telpak circuits available to MCI if MCI did not use them to provide service to their customers (Tr. 299). There is no engineering reason for making the content of the communications the

[23] AT&T called as witnesses Hrishikesh Vinod and George E. Mandanis. They are economists who did studies demonstrating that economies of scale exist in the Bell system (Tr. 1614, 1652). Their studies do not mention the customer premises restriction or deal with the impact from piece-out (Tr. 1617, 1631, 1635, 1673).

[24] As noted *supra*, Dalane conceded that the question of possible resale by MCI was not considered by AT&T in rejecting MCI's request for Telpak (Tr. 325).

criterion for determining whether Telpak circuits would be provided (Tr. 284). Rather, the reason for making the distinction in the content of the communications was merely to ensure that a carrier would not resell the Telpak circuits (Tr. 284, 298).

64. AT&T's rationale for imposing the resale and use restrictions was to prevent OCCs from using private line services to develop their own message telecommunications network (Tr. 298). AT&T was concerned that the private line service could be bought at preferential (*i.e.*, bulk) rates and resold at rates which were lower than the rates which it had established for message service (Tr. 281). Similarly, the reason why AT&T eliminated Telpak after the Commission's decision in the Docket No. 20097 *Resale And Share Use* decision was because of the fear that reselling of Telpak would undercut AT&T's rate for individual private lines (Tr. 342–343).

65. The resale and use restrictions were not applied to the independent telephone companies. If, for example, the Lincoln Telephone and Telegraph Company desired to provide bulk discount service to its customers between Lincoln Nebraska and a city serviced by AT&T, Lincoln and AT&T would each provide a portion of the service and AT&T would not invoke the use or resale restrictions (Tr. 292). AT&T would not, however, make a similar exception for MCI. If MCI were to provide a link from City A to City B, and requested AT&T to provide a link from City B to City C, the request would be denied (Tr. 293).

66. If, however, Lincoln were to provide a communications link from Lincoln, Nebraska, to a city beyond its franchise area, *e.g.*, St. Louis, Missouri, AT&T—invoking the restrictions in Tariff FCC no. 260—would not have provided Lincoln Telephone with a communications circuit from St. Louis to Chicago (Tr. 336–337). No engineering justification existed for such discrimination (Tr. 338). AT&T's rationale was that the economic arrangements it had with the Independents would be upset if it permitted Lincoln to operate outside its normal operating area (Tr. 339).

67. Furthermore, an AT&T customer could band together with others in the same general line of business and receive or transmit communications which related to matters of common interest (Jt. Ex. 1, Doc. 11, § 2.2.1.(B)). Tariff FCC No. 260 services could also be used for the transmission of communications relating directly to the business of a subsidiary corporation over which the AT&T customer possessed more than 50 percent of the voting stock (Jt. Ex. 1, Doc. 11, § 2.2.1(c)). These two provisions acted to expand the general use provision by laying down general rules permitting communications beyond those set forth in the general use provision (Tr. 294).

68. Subsections D through J of Section 2.2.1 of AT&T's Tariff FCC No. 260 created exceptions to the general use provision by creating narrow classes of customers who could engage in communications not contemplated by the general use provision (Tr. 294).

Thus, the departments and agencies of the United States government could transmit or receive communications to or from any section on a service furnished to that department or agency when the head of that department or agency notified AT&T in writing that the use were intended only for government business (Jt. Ex. 1, Doc. 11, § 2.2.1(D)). If the customer was an organized stock or commodity exchange, Tariff FCC No. 260 services could be used for the transmission of communications to or from an exchange member located on the floor of such exchange if the communication related directly to the business of the member (Jt. Ex. 1, Doc. 11, § 2.2.1(E)).

69. Similarly, where the use of the service related to coordination or exchange of electrical pooled power, Tariff FCC No. 260 services could be used for the transmission of communications between any two or more stations of such service or similar services furnished to others who were parties to the coordinating or exchange arrangement (Jt. Ex. 1, Doc. 11, § 2.2.1(F)).

70. Tariff FCC No. 260 services could also be utilized for the transmission of communications to, from, within and between air carriers, where the customer was an aeronautical communications company licensed to operate stations in the aeronautical mobile and fixed services (Jt. Ex. 1, Doc. No. 11, § 2.2.1(G)). Communications could also be transmitted to or from any station on a service furnished to the United States Postal Service for providing facsimile mail service (Jt. Ex. 1, Doc. No. 11, § 2.2.1(H)). If the United States Government ordered the service for it, any state or local government agency could use any Tariff FCC No. 260 service (Jt Ex. 1, Doc. No. 11, § 2.2.1(I)). Finally, if a composite data service vendor were the customer, Tariff FCC No. 260 services could be used for the transmission of switched data communications for its patron if the communications related directly to the business of such patron, or for composite data service or hybrid data processing rendered by a patron. Engineering considerations were not the controlling reason for permitting these exceptions to the use provisions (Tr. 294). AT&T was responsible for revising the tariff to permit these exceptions (Tr. 295).

71. In addition to general use restrictions, AT&T also carved out exceptions to the resale restriction. AT&T customers who were parties to arrangements for the coordination or exchange of electrical pooled power could resell Tariff FCC No. 260 services (Jt. Ex. 1, Doc. 11, § 2.2.3; Tr. 300–301, 304). The United States Postal Service was explicitly permitted to resell Tariff FCC No. 260 services if such services were used for Facsimile Mail Service (Jt. Ex. 11, Doc. 11, § 2.2.3; Tr. 300–01, 304). Additionally the resale restriction did not prohibit customers and authorized or joint users from sharing the cost of private line service (Jt. Ex. 1, Doc. 11, § 2.2.3; Tr. 301–301). An exception was also drawn for resale of certain Tariff FCC No. 260

services if they were to be used to provide public telegram message service (Jt. Ex. 1, Doc. 11, § 2.2.3).

72. In each case, the exception to the resale restriction came about as a result of a request from a party outside the Bell system (Tr. 304). In some cases, AT&T denied these requests (Tr. 321). For example, AT&T denied such requests from the American Trucking Association, the National Association for American Railroads and certain press organizations (Tr. 321–322).

73. Until 1973, AT&T also made Telpak available to Western Union at an additional discount (Tr. 322). Pursuant to this arrangement, AT&T provided Telpak to Western Union and Western Union then provided Telpak service to its own customers (Tr. 322–323). Western Union was provided the service at a rate less than the Telpak rate on file with the Commission (Tr. 1043).

C. Damages

74. Unable to obtain facilities from AT&T under Tariff 266 within the required time and having been refused Telpak service under AT&T Tariff 260, MCI obtained the required facilities from PT&T under Tariff 126 (Findings, para. 18). The total charges for which PT&T billed MCI for the 116 voice-grade circuits between Los Angeles and Oakland were $1,163,006.79 (Jt. Ex. 1, para. 22; MCI Ex. 11, Att. A). MCI actually paid PT&T the sum of $320,000.00 for the facilities provided in the period from July 7, 1975 through June 27, 1976 (Jt. Ex. 1, paras. 21 and 23). MCI claims damages in the amount of the difference between the charges for PT&T's circuits and the amounts which MCI would have paid AT&T under Tariffs 260 and 266 (MCI Ex. 11).

75. The parties have stipulated the number of circuits provided to MCI by PT&T on the various dates (Jt. Ex. 1, para. 21). The number of circuits were then used to calculate the total charges under various AT&T and/or PT&T tariffs (MCI Ex. 11, p. 3, Attachment A and B; Jt. Ex. 1, para. 22). The method of calculation was essentially a multiplication process. The numbers of circuits were multiplied by the appropriate tariff rate and totalled for the entire period. Equipment charges were added where appropriate (Tr. 1387, 1401). The tariff rates were not adjusted or changed in any way (Tr. 1294–95). The circuit charges under various tariffs or combinations of tariffs are shown below:

	Charges	*Tariff*	*Locations*
1.	$1,163,006.79	PT&T 126	LA - OAK
2.	283,730.00	AT&T 260	LA - OAK
3.	270,536.37	AT&T 260	LA - OAK
		and	
		PT&T 126	LA - OAK
4.	231,126.64	AT&T 260	LA - OAK
		and	
		AT&T 266	PHOE - OAK

5.	554,477.25	AT&T 266	PHOE - OAK

76. The first amount ($1,163,006.79) represents the amount PT&T has charged MCI for service ordered and provided to MCI during the 1975–1976 time frame (Jt. Ex. 1, para. 6 and 18).

77. The second amount ($283,739.00) is the amount Telpak C service would have cost MCI under AT&T Tariff No. 260 if the facilities had been available on July 1, 1975. MCI's request for Telpak C service (Jt. Ex. para. 14) was denied by AT&T (Jt. Ex. 2, para. 16).

78. The third ($270,536.37) and fourth ($231,126.64) amounts represent MCI's costs if it had been able to combine the best cost per circuit features of AT&T tariff 260 (Telpak) and PT&T tariff 126 or AT&T tariff 266, respectively (Tr. 1398–99).

79. The fifth amount ($554,477.25) represents the amount MCI would have been charged under their first order dated March 31, 1975 (Jt. Ex. 1, para. 7) for facilities from Phoenix to Oakland as of July 7, 1975 pursuant to AT&T tariff 266. This order was cancelled by MCI in a letter dated May 1, 1975 (Jt. Ex. 1, para. 13).

80. In addition, the following are the total circuit charges that would have been made had MCI transferred the circuits in question from PT&T tariff 126 (LA to OAK) to AT&T tariff 266 (PHOE to OAK) on various dates:

Charge	*Date of Change (From PT&T to AT&T)*
$746,991.61	9/10/75
766,616.47	9/16/75
808,675.80	10/01/75
821,627.40	10/06/75
824,084.21	10/07/75
847,316.98	10/17/75

81. The figures indicate that the sooner MCI had transferred its circuits to AT&T facilities the lower the total circuit charges would have been (Tr. 1397–98). The option of transferring from PT&T facilities to AT&T facilities would have been available under a 25-week normal interval once a firm order had been placed with AT&T (Jt. Ex. 1, para. 10), subsection (c)).

CONCLUSIONS

25 Week Issue

82. The record calls for a determination whether and to what extent AT&T's response to MCI order for 116 voice-grade circuits from Phoenix, Arizona to Oakland, California was unjust, unreasonable or otherwise in violation of Section 201(b) or 202(a).[25] The Designation Order notes that AT&T had previously provided an

[25] Section 201(b) makes unjust and unreasonable practices and regulations unlaw-

explanation for the 25 weeks period claimed necessary to meet MCI's service requirement with the OCC tariff, but that the explanation was unsupported. It concluded that "MCI should have the opportunity to develop facts which might demonstrate that AT&T's treatment of its OCC order was unreasonable, discriminatory or otherwise in violation of Sections 201(b) or 202(a) of the Communications Act" (85 FCC 2d 1001). MCI has failed to develop facts demonstrating that AT&T's treatment of its tariff order was unreasonable, discriminatory or otherwise in violation of Sections 201(b) or 202(a) of the Communications Act. Since MCI failed to meet its burden of proof, AT&T is not liable for damages under this issue.

83. The findings make clear that AT&T did not have 116 circuits idle and available for use. MCI suggests in its findings that AT&T should have investigated the possibility of providing 116 circuits on a voice grade level through Los Angeles. Even assuming the availability of the 116 Phoenix - Los Angeles circuits, the suggestion is not reasonable. As testified by Lambert, implementation of such a proposal would have tied up too much equipment. More important utilizing two sets of 116 circuits on a back-to-basic would have been unacceptable to MCI. MCI required "direct" circuits between Phoenix and Oakland (Tr. 801). In handling MCI's request, AT&T followed its standard procedures for handling requests involving a large number of circuits. For orders of seven circuits or less the AT&T sales person handling the order would fix a firm date with the customer and issue an order. However, a request for circuits greater than seven triggered the ISC procedures calling for the creation of a project team to handle the orders. MCI offered no evidence to indicate that the MCI order was the only OCC order handled in this manner. The uncontroverted facts show that this policy was universally applied to all orders for circuits greater than the seven in number.

84. AT&T's quotation in April 1975 of a 25-week interval was based on the general knowledge and experience of AT&T engineers employed in the Western Area Engineering Department. The 25 week normal interval which was quoted involved an assessment of how the two Super Group slots were configured and what Western Electric work would be required. Koch and Cullen determined that two Super Group slots were available between Phoenix and Los Angeles which could be connected to two Super Group slots between Los Angeles and Oakland. AT&T's report prepared in 1976 detailing the components of the various intervals totalling 25 weeks substantiated the correctness of the earlier judgment. The findings require the conclusion that AT&T's quote of 25 weeks to provide the facilities required by MCI was entirely reasonable. If anything, the

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ful. Section 202(a) makes it unlawful for any common carrier to unreasonably discriminate with respect to its charges, practices, regulations, facilities and services.

25 week schedule was ambitious. MCI has not offered any evidence requiring a different conclusion.

85. The 25 week period envisioned "normal" time intervals. Normal time intervals mean following regular engineering procedures. It does not contemplates extraordinary efforts such as treating a particular job on a priority basis. The time interval quoted by AT&T took into consideration that AT&T had other customers besides MCI and that all customers would be treated on a first come first serve basis. Indeed, if AT&T had shown preference to MCI in filling its order it might be concluded that AT&T had discriminated against its other customers in favor of MCI. Although the Commission has not had occasion to comment on AT&T's method of handling orders from customers for large numbers of circuits, it has noted that in a case where simultaneous demand cannot be accommodated, the provision of service "on a 'first come first served' basis is not unreasonable or unduly discriminatory within the meaning of Section 201 and 202 of the Act." *Metrock Corp.*, 73 FCC 2d 802, 46 RR 2d 711, 714 (1979). See also *Spanish International Network, Inc. et al.*, 78 FCC 2d 1451, 1465–66 (1980).

86. The procedures for processing OCC requests was the subject of discussion in the Docket 20099 settlement negotiations. MCI participated in these discussions. Docket 20099 provided for expedition of the normal time intervals at the customer's request. The findings show that some of the activities which AT&T had to perform to fill MCI's order could have been expedited. However, MCI never requested expedition. It is doubtful even assuming that expedition had been requested, that MCI's time constraints could have been accommodated. In any event, it is unnecessary to discuss the possibility of expedition since, as noted, MCI never requested expedition of the normal time intervals.

87. MCI argues in its Proposed Findings that the pertinent facts regarding the Bell System in 1975 was uniquely within the knowledge of AT&T and PT&T, that they had the obligation of preserving all pertinent evidence and that they had the burden of presenting it into the record. MCI's position is erronous. MCI has overlooked the fact that it, rather than AT&T, had the burden of proof. As noted in the Designation Order, while the carrier has the burden of proving the reasonableness of an increased charge in a rate investigation, the customer bears the burden of proving unreasonableness in a complaint proceeding (85 FCC 2d at 999). Further, MCI has never sought to shift the burden of proof to AT&T and PT&T and its attempt to do so in the post-hearing phase of this proceeding comes much too late. In addition, MCI's claim that AT&T denied it access to relevant documents and employees is completely unsubstantiated. AT&T's reply to MCI's findings completely rebut the contention. According to AT&T, during the discovery phase MCI was provided with substantial documentation which MCI chose not to use in this

proceeding. In this connection, MCI was given a copy of Koch's handwritten notes describing his research and excerpts from AT&T's internal documents setting out the relevant intervals. As pointed out by AT&T, its circuit availability reports are updated and superceded on almost a daily basis with only year end reports retained. The 1974 and 1975 year end reports, which are stored on computer tape were offered to MCI but MCI declined the offer (AT&T reply, para. 44). In addition, AT&T's reply also makes clear that MCI was not denied access to any AT&T, PT&T or Western Electric employee. In this connection, MCI never requested a subpoena to compel an employee's testimony. In light of the foregoing, the decisions cited by MCI for the proposition that AT&T must assume the burden of proof because of AT&T's failure to produce relevant documents are inapposite.

Telpak Issue

88. The issue calls for a determination whether AT&T's refusal to accept MCI's April 10, 1975 order of two bundles of Telpak C offerings from Oakland, California to Los Angeles, California was unjust, unreasonable or otherwise in violation of Sections 201(b) or 202(a) of the Communications Act. The Designation Order recognized that the Commission's 1976 decisions found the customer premises[26] and resale[27] restrictions to be unlawful. The Designation Order, however, rejected MCI's argument that it was entitled automatically to a judgment in its favor simply as a result of these decisions. It pointed out that the issues in MCI's complaint for damages are different from those in the policy making investigations and "there may be changes in circumstances or defenses available to AT&T which would justify a different result" (85 FCC 2d at 999). The Designation Order also rejected AT&T's contention that MCI should be denied an award for damages because the customer premises restriction was a legally effective provision in AT&T's Tariff 260 in 1975. It stated that carrier-initiated tariff provisions may be subject to a damages award if the provisions are later found to be unlawful citing *Arizona Grocery Atchison, T & S FR Co.*, 284 U.S. 370 (1932). It further stated that "AT&T's customer premises and resale restrictions plainly were never approved or prescribed by the Commission; they were merely initiated by AT&T and permitted to become effective" (85 FCC 2d at 1000). Therefore, damages may be awarded as a result of those restrictions "if they are found to have been unlawful at the time and circumstances in which they were applied" 85 FCC 2d at 1000. It is concluded that MCI has met its burden of

[26] *AT&T Restrictions on Interconnection of Private Line Services*, 60 FCC 2d 939 (1976).

[27] *Resale and Shared Use Decision*, 60 FCC 2d 261 (1976).

proving that the customer premises and resale restrictions were unlawful in 1975.

89. AT&T has raised certain threshold questions which must be disposed of before the findings supporting this conclusion are considered. AT&T argues that MCI is precluded from bringing this action by its agency relationship to General Motors. AT&T rests this contention solely on the fact that MCI's April 10, 1975 order for Telpak service stated that MCI was ordering as agent for GM. The Commission previously considered and rejected AT&T's contention in its Memorandum Opinion and Order released October 25, 1979 (74 FCC 2d 184, 192). The Commission stated:

> "In response to a request for information from the Bureau staff, MCI indicated in its Amendment To Complaint that it offered to GM an end-to-end from Oakland to Chicago and Detroit. This was listed in MCI's tariff FCC No. 1. Thus, MCI was not acting as a purchasing agent for GM in the sense that it would locate circuits for GM's needs and pass these charges on to GM. Rather, GM was purchasing its communications needs from MCI, and MCI was using AT&T and PT&T lines, in part, to provide service to GM. In other words, MCI was acting as a reseller of AT&T's Telpak services."[28]

Although, the Designation Order vacated the Commission's denial of MCI's formal complaint, it did not modify its ruling on AT&T's agency argument. AT&T has not submitted any evidence in this proceeding which would disturb the conclusion that MCI's relationship to GM was that of carrier and customer. On the contrary, the findings establish that AT&T clearly understood that the Telpak services though ordered in GM's name were clearly intended for the use and benefit of MCI in meeting its July 1, 1975 target date for providing comprehensive services to GM. AT&T had itself been an unsuccessful competitor for the GM contract and was thoroughly familiar with its details. The agency designation which AT&T required in no way misled it as to the relationship between MCI and GM or the purpose of MCI's order. In view of the actual relationship between MCI and GM and the purpose for which the Telpak order was placed, it is clear that MCI had an interest in the Telpak transaction sufficient to entitle it to sue.

90. AT&T also states that MCI was barred from ordering Telpak by the Docket No. 20099 Settlement Agreement (see 52 FCC 2d 727, 738 (1975)). According to AT&T, MCI was bound by the terms of the Settlement Agreement to order all its interstate facilities pursuant to Tariff 266 and all its intrastate facilities pursuant to the appropriate Bell System Operating Company tariff. AT&T's contention is rejected. AT&T ignores the fact that while Telpak rates were

[28] The Commission also noted: "In order to ascertain the nature of the agency relationship between MCI and GM we do not look to what AT&T claims it should have been. Rather, we look to what MCI says it actually was, and MCI states it would have billed GM for service from the midwest to Oakland" (74 FCC 2d at 192, footnote 14).

discussed at the negotiations, the parties "agreed not to agree" on the Telpak question (Tr. 898). Paragraph 15 of the Settlement Agreement (52 FCC 2d at 742) specifies that "the provisions of AT&T Tariff FCC No. 260 were not included among the matters designated for investigation in FCC Docket No. 20099." Paragraph 6 of the agreement, cited by AT&T, which makes no mention of Telpak or the customer premises or resale restrictions, clearly does not bar MCI from requesting Telpak. Accordingly, the Agreement does not contain any provisions for or restrictions against the OCC's subscribing to Telpak service. In addition, the Agreement does not compel MCI to take facilities only under the tariffs filed as a result of the Agreement.[29] In other words, the Settlement Agreement does not purport to contain the exclusive terms and conditions under which the OCCs could take facilities or services from the Bell System. Rather, MCI was free to choose the tariff schedule which most suited its needs. The cases cited by AT&T concern power utility companies which had contracted with customers for service at particular prices. The power companies attempted to override these contracts by filing tariffs. MCI was not bound by such a contract. It had no pre-existing obligation to AT&T not to order circuits under Telpak. In the absence of some specific provision in the Settlement Agreement binding the OCCs to order facilities or services exclusively pursuant to the tariff referenced in the Agreement, the Settlement Agreement did not bar MCI from ordering Telpak service.[30]

91. Turning to the substantive matters raised by the issue, the findings establish that AT&T denied MCI's Telpak request on the basis of the customer premises restriction contained in Tariff 260. Dalane admitted that the resale restriction was not considered in evaluating MCI's order. Nevertheless, in the course of his testimony, Dalane asserted that MCI's use of Telpak to provide service to GM would violate the resale restriction contained in that tariff. The lawfulness of AT&T's action denying MCI's Telpak request turns on the lawfulness of these restrictions.

92. The customer premises or "piece-out" provision included in Section 2.6.3 of Tariff 260 restricted interconnection of private line services to premises where the customer had a regular and continu-

[29] Implicit in AT&T's argument is the assumption that Tariff 260 and 266 (which was filed as a result of the Settlement Agreement) are mutually exclusive. However, Dalane, Manager of business relations for AT&T's Long Lines Department conceded that there was no language in Tariff 260 which would prevent an OCC from ordering facilities under that tariff and instead require the OCC to order facilities under Tariff 266. The tariffs are independent of one another (Tr. 326, 327).

[30] In the Appendix to its proposed findings, AT&T reasserts its contention that the doctrine of *res judicata* bars MCI from receiving damages in this proceeding. AT&T's contention was considered and previously rejected for the reasons stated at the hearing conference held July 9, 1981 (see Tr. 970–974). AT&T's Appendix provides no basis for reconsidering the ruling.

ing requirement to originate or terminate communications. Pursuant to the customer premises restriction, AT&T would not provide private line service between Cities A and B if the potential customer wished to provide its own communications system between Cities B and C and City B was merely to be used to connect the AT&T line with the customer's own system. Similarly, AT&T would not provide the circuit between Cities A and B if that circuit were merely to be connected at City B to the circuit of another common carrier between Cities B and C. However, the tariff contained exceptions to the customer premises restriction for several classes of customers. Thus, AT&T provided service to the international record carriers (IRC) for use by the IRC's customers, even though the service did not terminate at the customer's premises. AT&T also supplied service to an IRC's data message switcher in order to permit the IRC to connect to AIRCON, PLC or ARX services even though a customer's premises was not involved. Similarly, AT&T would have provided service to a switch, not located on a customer's premises, if the switch were owned by a composite data service vendor and were used for the switching of data messages. AT&T ignored the customer premises restriction if an agency of the U.S. government needed service. AT&T also made an exception to the restriction if an entrance facility connection were involved. In addition, AT&T did not require that the interconnection take place at a customer's premises if the connection were to be between AT&T and either a Bell System operating company or an independent telephone company, such as the Lincoln Telephone and Telegraph Company. Thus, the tariff in 1975 discriminated among various classes of customers. In addition, AT&T's OCC tariff, No. 266, offered to other common carriers in 1975 the same facilities which MCI sought pursuant to the Telpak tariff but without the customer premises restriction and at a higher price. Therefore, it must be concluded that the Telpak tariff discriminated in connection with the provision of like communications services. AT&T has not justified the discriminatory treatment.

93. AT&T contends that the customer premises restriction was necessary for the following reasons: (a) AT&T's alleged need to protect itself from economic harm resulting from impairment of its nationwide average pricing scheme; (b) "churning" and (c) to prevent technical harm to the network.

94. AT&T asserts that carriers such as MCI will choose to provide their own facilities for the high density, low cost portion of the overall route, while leasing only the low density high cost portions from AT&T. This allegedly undermines AT&T's nationwide average pricing scheme which is based on the average costs for high density and low density routes. AT&T's claim, however, is undercut by the fact that the tariff restriction made no distinction between high-cost and low-cost routes. The restriction was based on the type of termination, not on the type of route. Thus, the restriction acted to

prevent the interconnection of high-cost OCC or private microwave routes with low-cost AT&T routes just as much as it served to prevent the converse situation. Moreover, the fact that the restriction focused on interconnections rather than the routing meant that the restriction did not necessarily prevent a customer from linking high-cost AT&T routes with low-cost OCC and private routes. As long as the customer had a need to originate and terminate communications at the location which linked the routes, the customer premises restriction would have permitted the interconnection. Further, AT&T has presented no evidence to document economic harm to itself or to the public if it were to de-average its prices. Prior to 1975, the Commission rejected arguments relying on nationwide average pricing. In its 1971 *Specialized Carrier* decision, *supra*, the Commission considered permitting the entry of specialized common carriers into private line markets. AT&T specifically alleged that the entry of specialized common carriers into private line markets would "seriously undermine the policy of uniform interstate rates" 29 FCC 2d 870, 876. The Commission found that argument to be outweighed by the public interest in favor of the entry of new carriers in the specialized communications field to meet the demand for new and diverse sources of supply and competition, 29 FCC 2d 870, 920. The Commission also made clear that it would not object to AT&T's departure from the uniform nationwide rate policy. Significantly, AT&T was advised in 1972 by its Council of Economic Advisors that the best economic answer to cream skimming is not to prohibit piece-out but to abandon nationwide average pricing and to price each route according to its costs. If such pricing were used, according to the Economic Advisors, there would be no economic justification for refusing to piece-out. Thus, the economic rationale advanced by AT&T in support of its customer premises restriction was belied by its own Council of Economic Advisors.

95. Another aspect of AT&T's economic harm rationale for the customer premises restriction is the alleged danger of "churning", *i.e.*, the creation of superfluous or redundant facilities, resulting in an economic penalty to AT&T. This argument suffers from the same basic defects as the nationwide average pricing argument. In other words, AT&T has presented no specific factual evidence to prove that churning would result from the provision of MCI's requested service or that AT&T would suffer specific financial harm. Moreover, to the extent that AT&T is concerned about recovering the costs of facilities constructed for a specific customer, there are other means by which it can protect itself. For example, the Telpak tariff contains a provision for special construction charges. Such a charge might be designed to reasonably protect against a legitimate economic burden generated by a facilities request unique to a customer.

96. AT&T's end-to-end responsibility rationale is similarly unsupported, and without merit. AT&T made the bare assertion that

unless one carrier or an individual has responsibility for the entire thing, the probability of it not working properly is very high (Tr. 251). However, AT&T offered no evidence in support of its contention that harm to the network or technical difficulties would result if piece-out was allowed. Indeed, AT&T admits there are no technical studies to support its theory of harm to the network if the customer premises restriction were not in effect. In this connection, as noted by the Commission in the "Piece-Out" decision, which has not been rebutted by AT&T, "[n]o greater potential for technical or engineering harm to AT&T's network results from termination of Tariff 260 services at the premises of OCCs than results from termination of like circuitry obtained under AT&T 266 and B.O.C. Tariff 3 at the premises of OCCs" (60 FCC 2d at 945). In the absence of a showing of specific technical harm to the network, a restriction on customer interconnection is unlawful. *Hush-a-Phone Corp.* v. *U.S.*, 238 F.2d 266 (D.C. Cir. 1956); *Carterfone*, 13 FCC 2d 420, 423 (1968), *recon. denied*, 14 FCC 2d 571 (1968). In *Carterfone*, the Commission rejected as unreasonable

> ". . . AT&T's position that because AT&T cannot control the interconnected private system, interconnection is by definition a degradation of the message toll telephone system . . . without regard to the actual harmful effects." 14 FCC 2d 571, 572.

97. It is concluded, that MCI has met its burden of demonstrating that AT&T's refusal to accept its Telpak Order on the basis of the customer premises restriction was unjust, unreasonable and unduly discriminatory in violation of Section 201(b) and 202(a) of the Communications Act. Likewise, for the reasons discussed *infra*, a refusal to accept MCI's Telpak Order on the basis of the resale restrictions would also be violative of Section 201(b) and 202(a) of the Act.

98. Essentially, the use restriction meant that AT&T would refuse to provide service to a customer because that customer was not the ultimate user of the service. The use restrictions of AT&T Tariff 260 complemented the resale restriction. These restrictions limited the purposes for which the services included in Tariff 260, such as Telpak could be used. The purpose of the use restriction was to ensure that such services could not be resold. AT&T asserts that the restrictions were needed to prevent the establishment of a message telecommunications (MTS) type of service and to prevent the undercutting by a reseller of AT&T's unit rates for message and private line service. Neither of these reasons can justify the imposition of the resale and use restrictions.

99. AT&T's claim that its resale and use restrictions were necessary to prevent the establishment of an MTS-type service pursuant to established Commission policy is both factually and legally irrelevant in the context of this case. The record here is clear that MCI wanted circuits to provide CCSA service to GM. The

Commission has already ruled that CCSA was a private line service. See *Bell System Tariff Offerings*, 46 FCC 2d 143 (1974), *aff'd*, *Bell Telephone Company of Pennsylvania* v. *FCC*, 503 F.2d 1250 (3rd Cir. 1975), *cert. denied*, 422 U.S. 1026, *recon. denied*, 423 U.S. 886 (1975). Furthermore, contrary to the premise of AT&T's rationale for the restrictions, there was no legal prohibition against the provision of MTS-type service by MCI at the time of the GM circuit order. See *MCI Telecommunications Corp.* v. *FCC*, 561 F.2d 365 (1977), *cert. denied*, 431 U.S. 1040, mandate enforced, 580 F.2d 590, *cert denied*, 439 U.S. 980 (1978). In addition, AT&T's rationale that the resale and use restrictions were necessary to prevent the reseller from undercutting AT&T's rates is actually evidence that the restrictions were unlawful. *Interstate Commerce Commission* v. *Delaware, Lackawanna and Western Railroad Co.*, 220 U.S. 235 (1911).

100. In addition to being unjust and unreasonable, the resale and use restrictions were also discriminatory. AT&T carved out numerous exceptions to these restrictions. Pursuant to these restrictions, electrical companies, aeronautical communications companies, the United States Postal Service and public telegram message service carriers could all resell Tariff 260 services. Customers and authorized or joint users could share such services. Stock exchange, electrical companies, aeronautical communications companies, the United States Postal Service, United States government agencies, composite data service vendors and other entities could all use Tariff 260 services despite the restriction that such services could only be used for "the transmission of communications to or from the customer and relating directly to the customer's business." Ironically, MCI itself could have used Tariff 260 services, but only if the communications placed over the AT&T circuits were MCI's internal communications. MCI could not use such circuits to serve its own customers. Also, discrimination existed with respect to AT&T's treatment of MCI as compared to the independent telephone companies and AT&T's own operating companies. AT&T could connect with the independents and the operating companies at any point within the franchised territory of the operating company or independent company and then, through the creation of a joint service permit the operating company or independent company to sell that service to its customers. AT&T would not invoke the use or resale restriction. If MCI, however, sought to act in the manner of an operating or independent company, AT&T would not have provided the circuits. Thus, AT&T clearly discriminated against MCI in its application of the resale and use restrictions.

Damages

101. MCI is entitled to damages resulting from AT&T's unlawful refusal to provide Telpak circuits. Because of AT&T's unlawful act, MCI was forced to order circuits from PT&T under Tariff FCC No.

126. PT&T billed MCI $1,163,006.79 under FCC No. 126 for the 116 voice grade circuits between Los Angeles and Oakland. MCI has paid PT&T $320,000. MCI was only required to pay $231,126.64. The Presiding Judge agrees with MCI that its measure of damages is the difference between the charges for PT&T's circuits ($1,163,006.79) and the amount which MCI would have paid under Tariff 260 and under Tariff 266 at the per-line rate were less expensive than Telpak ($231,126.64). MCI has not offered any evidence which would permit the conclusion that PT&T acted improperly in providing service under Tariff 126 or played any part in AT&T's refusal to provide service under Telpak. MCI's damages stem solely from AT&T's unlawful refusal to provide Telpak circuits. AT&T is therefore, ordered to pay MCI $931,880.15 in damages.

102. The Common Carrier Bureau argues that MCI should not be awarded damages for the period between July 7, 1975 and October 2, 1975. The rationale for this argument is an assumption that no Telpak circuits would have been available during that time due to the 25 week normal interval involved in providing new circuits. The Bureau overlooks the fact that the only record evidence dealing with non-availability of circuits concerned MCI's request for circuits between Phoenix and Oakland. MCI's request for Telpak was for circuits between Los Angeles and Oakland. It has not been alleged that there was a shortage of circuits between Los Angeles and Oakland. In fact, AT&T does not claim that it did not have the facilities to furnish Telpak to MCI. MCI's Telpak order would not have required the wiring of AT&T's Phoenix - Los Angeles to AT&T's Los Angeles - Oakland circuits, as would have been the case with the circuits ordered under Tariff 266. Rather, MCI's circuit would merely need to be terminated at the appropriate facility for connection to the Los Angeles - Oakland circuits. This is precisely what was done when MCI obtained circuits under PT&T's Tariff 126. These circuits were all obtained in time for the cut-over date of the CCSA switch in July 1975. Dalane admitted that AT&T would use PT&T circuits if necessary to fill an order (Tr. 336). Accordingly, contrary to the Bureau's contention, circuits were, in fact, available to meet MCI's Telpak request. There is, therefore, no basis to limit MCI's damages to the period of October 2, 1975 to June 27, 1976, as suggested by the Bureau.

103. The Bureau also urges that AT&T should reimburse PT&T, rather than MCI. However, the issues call for a determination of damages to be awarded to MCI. The Commission did not include an issue and PT&T has not sought enlargement of the issues so as to permit reimbursement to PT&T. Moreover, as noted by MCI in its findings, PT&T has filed a civil action in the United States District Court for the Southern District of California seeking to collect the difference between the amount which MCI paid PT&T and the amount which PT&T claims it was entitled to under its tariffs.

Under the circumstances, it is appropriate that the question of reimbursement by MCI to PT&T should be decided in that forum.

104. AT&T contends that MCI failed to meet its burden of proving damages. It argues that, as a matter of law, the difference between PT&T Tariff 126 rates and Telpak rates is not legally sufficient proof of damages, citing as its authority *Interstate Commerce Commission* v. *United States ex rel. Campbell*, 289 U.S. 385 (1973). According to AT&T, MCI must prove that the PT&T rates were unreasonable and that the Telpak rate would have been reasonable if the customer premises and resale prohibitions were removed, citing, in addition to *Campbell*, *Baer Bros.* v. *Denver, R.G.R.R.*, 233 U.S. 479 (1974) and *Arizona Grocery*, *supra*. AT&T further argues that to award damages requires the same findings as a prescription for the future.

105. Campbell does not, as AT&T suggests, preclude the possibility that the rate discrepancy may sometimes be the measure of damages. As noted by MCI, courts both before and after *Campbell* have found the difference between rates to be an accurate measure of damages. *Meeker* v. *Lehigh Valley R. Co.*, 236 U.S. 412 (1915); *States Marine Lines, Inc.* v. *Federal Maritime Commission*, 313 F.2d 906 (D.C. Cir. 1963). In *Campbell*, the Court held that where discrimination is charged, damages are not presumed. There must be proof of specific pecuniary loss.[31] "Recovery cannot be had unless it is shown that, as a result of defendant's acts, damages in some amount susceptible of expression in figures resulted" (289 U.S. at 390). MCI has satisfied these evidentiary requirements. The damages which MCI requests are not hypothetical or speculative. MCI demonstrated that it was billed by PT&T for $1,163,006.79 for circuits ordered solely as a result of AT&T's unlawful actions. Thus, MCI has demonstrated actual damages in the amount of the difference between the charge for PT&T's circuits and the amount which MCI would have paid AT&T if AT&T had not acted in violation of the Communications Act of 1934, as amended.

106. Similarly, *Baer Bros* and *Arizona Grocery* does not stand for the proposition that MCI must demonstrate the reasonableness of the Telpak rate and the unreasonableness of the PT&T rate. In fact, those cases hold that the complainant is not required to make such a showing. In *Baer Bros.*, for example, the Supreme Court had before it a claim from a carrier that in awarding damages upon a complaint, the regulating agency must demonstrate the reasonableness of the rate which the complainant alleged it should have been charged. The Supreme Court found that the carrier's claim confused the distinction between a complaint and a ratemaking proceeding, a confusion which has permeated AT&T's Proposed Findings. The point missed by AT&T but clearly enunciated in *Baer Bros.*, is that the reason-

[31] See *Hughes Sports Network*, 25 FCC 2d 550, 555 (Rev. Bd. 1970).

ableness of Telpak would need to be proven only if MCI were seeking to have that rate prescribed for the future. MCI did not request such a prescription in this proceeding.[32] Similarly, AT&T is confused with respect to MCI's burden concerning PT&T Tariff FCC No. 266. MCI is not alleging that the PT&T rate is discriminatory vis-a-vis the Telpak rate. Rather, MCI is contending that the PT&T rate is part and parcel of the measure of damages since it is the PT&T rate which MCI was forced to pay as a result of AT&T's unlawful refusal to provide Telpak.

Accordingly, IT IS ORDERED, That unless an appeal from this Initial Decision is taken by a party or is reviewed by the Commission on its own motion in accordance with the provisions of Rule 1.276,[33] MCI IS AWARDED damages of $931,880.15 for the unlawful acts of AT&T found under issue (a) and DENIED damages under issue (b).

FEDERAL COMMUNICATIONS COMMISSION
JOSEPH CHACHKIN, *Administrative Law Judge*

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[32] The Designation Order citing *Baer Bros.* and *Arizona Grocery* spelled out the difference between damage and rate fixing cases (85 FCC 2d 998–1000).

[33] In the event exceptions are not filed and the Commission does not review the case on its own motion, this Initial Decision will become effective fifty (50) days after its public release as prescribed by Rule 1.276(d).

Common Carrier
Common Carrier, Rates, Charges
Reports Required to be Filed

Notice of Proposed Rulemaking adopted proposing a plan for the Commission to monitor the effects of interstate access charges and various rate changes on the availability of local service.
–MTS/WATS Market Structure (Phase IV)
CC Docket No. 78–72

FCC 83–254

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of MTS AND WATS MARKET STRUCTURE	CC Docket No. 78–72, Phase IV

NOTICE OF PROPOSED RULEMAKING

(Adopted: May 26, 1983 Released: June 8, 1983)

BY THE COMMISSION: COMMISSIONER FOGARTY NOT PARTICIPATING; COMMISSIONER RIVERA ISSUING A SEPARATE STATEMENT; COMMISSIONER SHARP ABSENT.

I. INTRODUCTION

1. In the *Third Report and Order* (*Order*) in this proceeding, we stated our intention to "monitor the effects of the implementation of end user access charges" during the transition period described in the *Order*.[1] We directed the Common Carrier Bureau to prepare a monitoring plan and to present it to us within ninety days of the publication of the *Order*. This *Notice* describes the preliminary plan developed by the Bureau and seeks comments on that plan. We have also attempted to incorporate the concerns voiced by the Federal-State Joint Board Members in this plan, particularly the effects of separations changes and the high cost factor.

2. *The Third Report and Order*, among many other fundamental changes, has mandated end user access charges. These charges will be paid by all telephone subscribers to recoup the costs assigned to the interstate jurisdiction through the separations process. The rate structure decisions made in the *Third Report and Order* represent a fundamental change in the way exchange carriers are compensated

[1] *MTS/WATS Market Structure Inquiry*, 48 F.R.10319 (March 11, 1983), par. 196.

for the use of their facilities. We have strived to ensure that the changes which we have ordered will benefit telephone users and that we have properly allowed for all contingencies. However, because of the fundamental changes the industry is undergoing, we recognize that unforeseen consequences may arise. One of the important expressed goals of the *Third Report and Order* is universal service.[2] We therefore have an obligation to carefully follow the effects of our decision. We believe that the most skillfully crafted plan can only be successful with the full assistance and consent of the principal actors in this industry. The comments on this *Notice* will serve as the basis for our future activities. We also believe that a frank dialogue on the available data, analytical methods and the expected (and reachable) results is essential. We want the best possible valid information which will be acceptable to all interested parties.

3. Members of the Joint Board (Docket 80–286) have expressed concern about the impact of access charges and jurisdictional separations changes on telephone subscribers. Their concerns are very similar to ours in the *Third Report and Order*. In that *Order*, we established the Universal Service Fund which would offset the costs of providing service in certain areas. The means of funding this is a charge from all toll users, as outlined in the *Order*. The level of funding for the Universal Service Fund and the targetting of rate support are being established by the Joint Board through operation of the high cost factor. We understand the mutual interests of State and Federal regulators lie in the maintenance of the nationwide availability of telephone service at reasonable rates. Through the monitoring plan developed in this proceeding we hope to develop information that will answer our common concerns.

II. The Access Monitoring Plan

A. Summary of the Monitoring Plan

4. We propose to collect information in two major related areas: rates and the number of residential access lines. This information will be collected annually for seven years. Some information will be gathered from all telephone companies while more detailed information will come from a sample of companies. The staff of the Common Carrier Bureau will analyze the information and report to the Commission each year.

5. The rate information described below will tell the Commission how rates are changing, e.g., how quickly some rates are increasing, whether a "lifeline" or "dial tone" rate is being offered, and will attempt to show why rates are changing. The access lines information will tell us whether the number of access lines is increasing or decreasing. However, these direct measures are not sufficient to

[2] *Order*, pars. 363, 366.

address the fundamental question of what changes are occurring in the residential penetration rate; that is, the percentage of households with telephones (or excess lines). While the number of lines may increase or decrease, the number of residences may be increasing or decreasing at a different rate. If this is so, the mere counting of lines would be misleading. As an elementary example, if the number of access lines stayed constant but the number of residences increased, the portion of residences that would be subscribing to telephone service would fall. It is not our objective only to be concerned with the number of residential access lines. Instead, we must focus our attention on whether the portion of potential users willing to pay for service has changed.

6. This interpretive function is clouded by the fact that the data concerning residences (households) is not kept on the same basis as telephone industry information. Demographic information[3] is usually kept on the basis of political subdivisions (e.g., states, counties) whereas industry data is kept on bases (e.g., exchange or company level) which do not correspond to political subdivisions. It is this inconsistency which is the crux of the analytical problems discussed in this *Notice*.

7. We believe that we can learn much from the behavior of prices, the quantity of lines demanded, and the causes for such changes over the next few years. This value is not diminished by problems in reconciling demographic and industry data. However, when it comes to estimating penetration rates at the company, or lower level, which are the elementary measures of changes in the availability of service, we note the problems with the accuracy of the data and the issues involved in analyzing it. As one known, accurate measure, we propose to use penetration data from the Current Population Survey. The sample from which this data is collected is designed to be accurate only to the state level. Further disaggregation is a question upon which we seek comments. The most important goal of this *Notice* will be to determine from the comments whether an acceptable estimate or indicator of telephone penetration levels can be found and at what level of aggregation (eg., exchange, county, company, state) we can successfully measure changes in service and meet our objectives listed below.

B. Objectives

8. The primary purpose of the Access Monitoring Plan is to track the availability of basic residential telephone service over the seven-year access charge transition. We want to know whether the availability and use of residential service is being affected, how

[3] Besides the number of households, we would expect to use other data representing factors that would affect the purchase of residential service. For example, we would review the consumer price index (a measure of inflation), unemployment, income, and other statistics.

prices are changing and why. This effort will encompass service in the various states, districts, territories and possessions of the United States; that is, the areas which are subject to the *Access Charge Order*. While we stated in the *Access Charge Order* that we were concerned with the effects of the newly instituted end user access charges, it is clear that many factors will have an effect on residential access line penetration.[4] Because so many changes that will affect local rates are occurring simultaneously, we cannot ignore other factors in our analysis.[5] We are interested in the larger question of the availability of service. Therefore, another goal of the project will be to gather information on the components of local service rate increases and analyze these changes in concert with the shift to end user access fees. We would like to focus on changes in local rates due to changes that may be made in the current jurisdictional separations formula, the deregulation of CPE, changes in depreciation rates, and the amortization of inside wiring investment, among others.

9. The jurisdictional separations system will change substantially in the next few years. It is anticipated that the major effect on rates will be felt in the gradual movement away from the subscriber Plant Factor (SPF) to the new base and high cost factors. Coupled with the introduction of the high cost factor, significant shifts will likely occur in the amount of funds flowing to particular local areas. It is uncertain how and whether these changes will affect rates to residential telephone customers. The Universal Service Fund is intended to be a safeguard against abrupt changes in the highest cost areas. Nevertheless, the possibility exists that this safeguard may not sufficiently protect ratepayers to the extent anticipated by the Joint Board. We share the Board's expressed desire that vigilance is necessary. We wish to cooperate with the States in assuring that appropriate data are collected to meet their concerns. To this end, we invite comments that address the question of whether data collected herein will address the potential effects of the Joint Board's actions on rates and service availability as well as assuring that the entire system of explicit subsidies does not overburden those providing the funds for the subsidy.

10. Because it is likely that local tariffs will be restructured significantly over the next few years, we will pay particular attention to the lowest rate at which a subscriber can receive service.

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[4] The terms "residential access line," "residential main station" and "residential telephone service" are used interchangeably in this *Notice*.

[5] This point is well recognized. See *The Petition of the State of Michigan and Michigan Public Service Commission for Institution of an Inquiry and/or a Rulemaking Proceeding to Protect Universal Service* (MPSC Petition) and the Comments on that Petition. We plan to act on this Petition in the near future. One option under active consideration is whether to merge the Michigan PSC's request with this proceeding.

We want to know whether local suscribers are being offered a lifeline rate which would allow them to maintain connection to the telephone network. We also want to understand how our policies affect such an offering.

11. Another closely related objective is to develop information concerning actions at the state level that may affect telephone penetration. Besides lifeline rates, we want to be aware of new intrastate access charges and other actions which could also affect residential telephone penetration.

12. In all, we wish to create a picture of the various forces affecting local residential rates and basic telephone service. While the Commission is certainly concerned with other events resulting from the *Access Charge Order*, they will not be the subject of the surveys and analyses undertaken as a result of the adoption of this plan.[6]

C. Information To Be Collected

13. We plan to collect the information which we need by the use of two surveys. One data inquiry will contain a few pieces of information and will be put to all telephone companies. The second, more detailed inquiry will be sent to a representative sample of companies. We considered getting all the data from a sample of companies rather than from all carriers. However, we concluded that getting the most basic data from all companies will allow us to be certain that we would be able to monitor the basic changes in the entire industry and avoid the possibility that important changes in even the smallest companies would be missed.

14. The amount of data needed to support the objectives of this project is substantial. With over 1,400 companies, over 10,000 exchanges and 3,137 counties, one piece of information collected quickly metamorphoses into a large scale collection effort. We have already stated our intention "to place as little a burden as possible upon the small businesses which constitute the overwhelming majority of our nation's telephone systems".[7] Further, we want a plan which is manageable and can give us usable results in a reasonable amount of processing time. We have attempted to balance these considerations with the need to develop information which is as accurate and detailed as possible. We are open to ideas which would reduce the size of this effort yet support our fundamen-

[6] As an example, we expect that the adoption of end user access charges will result in decreases in certain interstate rates. Such changes can be monitored successfully within the Common Carrier Bureau. The changes in the level of OCC payments to local companies can be gathered directly at the Federal level either through a formal information request or informally. We expect that the OCCs' will inform us of such changes in one forum or other. Information on the "competitiveness" of the interstate market will also be examined.

[7] *MTS/WATS Market Structure Inquiry*, 48 F.R. 10319 (March 11, 1983) par. 196.

tal objectives. Any alternative approaches which still would measure changes in the availability of basic service will be considered.

15. There are two basic approaches outlined here. The first approach would be to collect penetration data directly from telephone companies using their estimates of the numbers of residences in their service areas. This may be somewhat inaccurate and will require the companies to report the counties they serve and also to estimate the number of residences in counties where they only serve a portion of the county.

16. The other approach would be to begin with state information from the Current Population Survey see para. 18, *infra*. Once each year, we could know fairly reliably the residential penetration by state. This measure would be associated with demographic characteristics, as described below. The penetration data would then be examined to determine the characteristics of those disconnecting. The next step could be one of several options. As one option, statistical analyses could be performed to determine what portion of the change in residential penetration was attributable to rate changes with the implicit assumption that managing other changes is beyond our control. This implies that a state-wide rate index be prepared. To do this, companies would have to report all residential rate options and the number of subscribers to each. (This also has the advantage of allowing us to construct other rate indices for levels of service; for example, the cost of making twenty phone calls a month, which would indicate changes in rates over time and overcome analytical problems in accounting for changes in rate options). Once the effect of rate changes is known, we can look among the reporting companies in each state for rate changes of sufficient magnitude to cause disconnects (thus eliminating companies where rate effects were insubstantial), identify specific deleterious changes and proceed to contact the companies directly to ascertain the characteristics of the affected companies (amount of high cost factor, level of access charges per customer and other characteristics). Another option would be to compare the statewide changes with access line data provided by the companies, paying particular attention to reductions over the course of a year. Those companies indicating absolute decreases would be contacted directly by the staff to ascertain what caused the drop in access lines.

17. Under any approach chosen, individual companies subject to rapid changes in their customer base would be welcome to come forward with information at any time.

1. *Current Population Survey (CPS) Data*

18. The Current Population Survey is a large, general purpose survey conducted monthly by U.S. Census Bureau. The major purpose of the CPS is to collect labor force participation data used to develop unemployment statistics. About 58,000 households are

interviewed from a sample of street addresses. Data on employment status, age, race, sex, education, marital status among others, are collected monthly. Each year, during the March survey, each household is asked for additional information concerning income for the previous year. As part of the survey, interviewers have routinely asked if the respondents had a telephone at which they could be reached. This last question is really not very useful for our purposes because a positive response does not mean that the an individual has a telephone in his or her residence. However, since March, 1983 the CPS has asked whether the respondent has a telephone in his or her dwelling—precisely the information which we would need to develop residential penetration figures. This data would be reliable on a country-wide level each month and down to a state level on an annual basis. Unfortunately, these are less reliable below the state level. The counties sampled account for over 85% of the U.S. population but only one third of the U.S. counties are surveyed and while they are represented in the "probability proportionate to size" sample design, very few sparsely populated counties are included. Specific information for areas below the state level and for territories and possessions would have to be collected directly by the FCC.

19. We propose to use the CPS data as the primary measure in our analysis. We need not be restricted by the information now collected by CPS. The CPS will ask nearly any question which can be justified as a portion of their survey and payment made on a cost-incurred, reimbursable basis. The CPS data has many advantages, not the least of which are reliability, speed and compatibility with other demographic data. If we can develop a price index for residential service (which requires information from all companies in a state on the number of subscribers to each rate option), we can relate changes in the economy, prices and demographics to changes in penetration, at least in a level as aggregated as a state. Because the CPS will ask different questions on a reimbursable basis, we also seek comments on whether we should contract with CPS to ask questions in addition to that already asked.

20. This leaves the question open whether we should go to a lower level of aggregation in the development of penetration figures. As we discuss elsewhere in this *Notice*, the reliability of these figures declines as we move to the company and exchange level, mainly because of the incompatibility of industry and demographic data. We will collect rate data, access line data and use the CPS data. The issue is whether we will compel companies to provide penetration data in each survey period or whether we will rely on the companies to come to us with data only when a change occurs at the local level. In the second instance we would assume that the state-wide data was a sufficient measure for continuous monitoring purposes.

21. Therefore, we have the following options:

Option 1: All companies report data on the number of subscribers to all residential

rates by state (for the purpose of constructing a statewide price index). This would include, then, information listed here such as lifeline or "dial tone" rates and the components of rates. Companies would develop and report penetration data to us only when measurable drops in residential access occurred.

Option 2: All companies report data on selected rates and supply us with penetration figures by operating areas as part of the regular reporting cycle. In this manner, complete information on penetration will be available for comparison. A disadvantage of this approach would be that we would have to average demographic data over the counties served and that demographic data may not be current.

2. Information to be collected from all companies.

22. As we stated, an important piece of information to be developed will be the measure of changes in residential telephone penetration; that is, the percentage of households with telephones (or access lines). Ideally, we would collect such information for each exchange or service area from the local company. This would correspond to the rate information which is available. However, it is uncertain that many local telephone companies could provide us with information on the number of households in each exchange or rate area.[8] It is critical that we get all of our information at the same level of aggregation to be certain that all the information is comparable and that our analytical techniques validly can be applied. We know that we can get state-wide data from the CPS as described above. The question is whether individual companies can provide reliable penetration data and whether we should go to this level (or even a county level) in our analyses.

23. While some companies track the number of building permits and the types and locations of local construction projects for planning purposes, even these may not know the total number of existing, occupied residences.[9] If the companies cannot provide these data by exchange we would have to find another source and take that information on whatever basis it is available. Adjustments to the data would have to be made. The main source of these data is the Census Bureau. Even the census data have drawbacks. The Census Bureau collects the number of households per county in the decennial census only. However, it does collect valuable data in the Current Population Survey (CPS) discussed above. The CPS is the basis of annual population data developed by the Census Bureau. We or the companies could use the average population per household for each county from the 1980 census and divide it into the annual population figures to get an annual number of households. This

[8] By this we mean an exchange or group of exchanges which have the same rates.

[9] The Rural Electrification Administration (REA) requires companies to perform an area coverage design (ACD) when they apply for their first loan. The ACD could give information on residences with and without service. In theory, this is kept up to date by the borrowers for planning purposes and to support future loan requests. This could be a valuable source of data on small companies.

requires an assumption that the population per household will remain reasonably constant over the period. As another source, there are commercial services that provide household and other demographic data by county for each year.[10]

24. A problem here, of course, is that the boundaries of franchise areas do not typically follow local political boundaries. This could cause some severe analytical problems. Absent a better proposal, we would collect the number of residential mains (or residential access lines) by service area or, alternatively, by county To develop the penetration information, it will be necessary to have the surveyed telephone companies list the counties and the respective exchanges they serve in their initial responses so that we may know which data has been combined by the companies or which we will have to aggregate. We realize that this is an imperfect proposition and it will entail a great deal of analytical effort. We want to minimize the error in any estimates, of course, but it appears that some will have to be tolerated. This means that we may not be able to discern very small changes in telephone penetration using this method.

25. In summary, the ideal measurement point would be the exchange, but we think that most companies would not have information on the number of households in their exchange areas. Without the number of households, it is difficult to determine a meaningful measure of service availability such as the penetration rate at the company level. Therefore, this argues in support of a "top down" type of analyses where state-wide figures are used as the major indicator. Nevertheless, even at the company or county level, the key aspect of the penetration rate will be how it changes over time. Precision in its definition and the initial estimation of the rate is important but not as critical as consistency over time. We are not taking a census. We want to measure how the penetration rate changes over the transition period. The fact that different companies may count residential mains or housing units differently is not as important as having each company count the same way each reporting period. Because of this, it is not necessary to develop completely precise definitions.[11]

26. Another major piece of information which we want from all companies is the lowest rate at which service is available. If the company has different lowest rates in different rate areas (e.g., based

[10] Another potential source of household data is that used by television rating services. The number of TV households is updated annually, based on estimates supplied by the commercial services.

[11] There may be other, very different workable approaches than those mentioned here, but the ones which we examined appear costly, imprecise or both. One proposal would have the companies survey customers who disconnect on the reason they disconnected. Because customer churning is high this would require a large number of responses. Further, many individuals would be involved in carrying out the survey and there would be significant expense involved.

on different exchange sizes), we will need them all with some indication of why they differ. The value of this information is high. If subscribers are not willing to pay this rate, they disconnect. We also will need to know the composition of this minimum rate. In other words, what portions of the rate are for interstate access, intrastate access, and so forth and whether any usage is included? If we get the information necessary to compile price indices, we will not need to collect this information separately because it will already be included in the rate schedule information used to develop those indices. The size of the exchange(s) to which the rate applies will also be reported, with size measured by the number of telephones. Companies will also be asked to note the "changes from last year" in the lowest rate, and there will be an inquiry on the form asking whether they have such a "lifeline" rate and whether they have a request for one pending before their state commissions. The final pieces of information which we will seek from all local companies are the average residential expenditure which indicates what individuals are actually paying and the level of any access charges and how they are billed (how much as a flat rate and how much for usage).[12]

3. Information to be collected from sample companies.

27. The Common Carrier Bureau staff will also draw a stratified sample of telephone companies representative of the various sizes of companies and reflecting their various cost characteristics (e.g., high cost). These companies will provide us with the information above plus certain detailed data which will help us ascertain the causes of local rate increases and give us a better picture of trends at the local level. We will have the sample companies report information concerning their rate increases. In particular, we will ask these companies to provide, on a per residential access line basis, the amount of rate increases attributable to changes in separations, depreciation, access charges, the phase-out of embedded CPE, and the amortization of the capitalized station connection costs. Further, if complete data on the number of subscribers to all rates are not collected from all companies, these sample companies will report the number of subscribers to their lowest cost service, the modal rate (the rate plan chosen by the greatest number of residential subscribers), the portion of subscribers subscribing to the "typical" rate, and the local flat unlimited calling rate on the same basis which it reports the information required in the "all companies" section listed above. The companies will eventually report the amount per line which is offset by (or the cost per line of) the high cost factor.[13]

[12] We wish to know the business and residential flat rates and the per minute (usage) amounts. This will assist us in gauging the "smoothness" of the transition.

[13] The Exchange Carrier Association will also be used as a source of data concerning collections and disbursements for the Universal Service Fund.

28. The detailed information will aid in determining the causes of rate increases, and shifts to the lowest priced service. It will also provide a data series on changes in today's most common residential rate, the flat rate, unlimited calling service. The information will aid the FCC and the Joint Board in isolating the effects of the Universal Service Fund subsidy.

D. Reporting Frequency

29. As soon as the Commission receives the appropriate clearances from the Office of Management and Budget, we will send out the first inquiry to all telephone companies. This will establish the baseline information. A few months later, we will begin the regular reporting cycle with all reports due sometime early each year. The Common Carrier Bureau will analyze the data and make reports on an annually.

30. Because of the import of this monitoring effort and the fact that annual reports may not capture rapidly deteriorating situations, if any occur, we contemplate that persons will bring information concerning such situations to the attention of the Chief of the Common Carrier Bureau. The information should be consistent with that gathered in the normal course of this effort along with further data necessary to support whatever relief is sought.

E. Regulatory Flexibility Analysis and Applicability of the Paperwork Reduction Act of 1980.

31. In the *Access Charge Order*, we certified that the Regulatory Flexibility Act did not apply to the rules adopted.[14] That same analysis applies here. Exchange carriers, even small ones, are dominant monopolies in their exchange areas. Because that is so, they would not fall under the definition of a "small entity." While the Regulatory Flexibility Act does not apply to carriers which will be affected by this plan, we have attempted to minimize the information burden on the companies while carrying out our public interest responsibility to ascertain the effects of our decisions on local service. We will assure that data requests which will support the final plan are made in accordance with the Paperwork Reduction Act (P.L. 96–511, 44 U.S.C. § 3501 *et. seq.*).

F. Other Questions.

32. Commenting parties should address the data collection requests outlined here and whether they meet our objectives and in general support our public interest determination that we monitor changes caused by our *Access Charge Order*. We also seek comments on the burden being placed on various companies by our plan or alternative proposals that may be less burdensome and still satisfy

[14] *MTS/WATS Market Structure*, 48 F.R. 10319 (March 11, 1983), paras. 358–362.

our information needs. Parties familiar with the Joint Board's activities should comment on the consistency between this plan and the monitoring activities contemplated by that body. If any group other than the FCC can collect some of the data (*e.g.* the states or the National Association of Regulatory Utility Commissioners), we will entertain such recommendations.

33. For the purposes of this non-restricted notice and comment rulemaking proceeding, members of the public are advised that *ex parte* contacts are permitted from the time the Commission adopts a notice of proposed rulemaking until the time a public notice is issued stating that a substantial disposition of the matter is to be considered in a forthcoming meeting or until a final order disposing of the matter is adopted by the Commission, whichever occurs earlier. In general, an *ex parte* presentation is any written or oral communication (other than formal written comments/pleadings and formal oral arguments) between a person outside the Commission and a Commissioner or a member of the Commission's staff which addresses the merits of the proceeding. Any person who submits a written *ex parte* presentation must serve a copy of that presentation on the Commission's Secretary for inclusion in the public file. Any person who makes an oral *ex parte* presentation addressing matters not fully covered in any previously-filed written comments for the proceeding must prepare a written summary of that presentation, and that written summary must be served on the Commission's Secretary for inclusion in the public file, with a copy to the Commission official receiving the oral presentation. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. *See generally*, Section 1.1231 of the Commission's Rules, 47 C.F.R. § 1.1231.

34. Accordingly, IT IS HEREBY ORDERED, that comments may be filed on the issues and proposals discussed herein no later than thirty days after the release of this *Notice* and that replies may be filed no later than fifteen days after the filing of comments. In accordance with the provisions of Section 1.419 of the Commission's Rules, 47 C.F.R. § 1.419, an original and five copies of all statements, briefs or comments, or replies, shall be filed with the Federal Communications Commission, Washington, D.C., 20554, and all such filings will be available for public inspection in the Docket Reference Room at the Commission's, Washington, D.C. offices. In reaching its decision, the Commission may consider information and ideas not contained in filings, provided that such information is reduced to writing and placed in the public file, and provided that the fact of the Commission's reliance thereon is noted in the Order.

35. IT IS FURTHERED ORDERED, that pursuant to 47 U.S.C. § 154(i), 154(j), 201, 202, 218 and 403, and 5 U.S.C. § 553, NOTICE IS HEREBY GIVEN of the proposed adoption of new or modified rules,

in accordance with the discussion and delineation of issues in this *Notice* and on the basis of previous notices and filings in this proceeding.

36. IT IS FURTHER ORDERED that the secretary shall send copies of this Notice to the Regulatory Commissions of the various states, districts, territories and possessions which will be affected by this Notice.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Separate Statement
of
Commissioner Henry M. Rivera

In the Matter of MTS and WATS Market Structure CC Docket No. 78–72, Phase IV (Access Monitoring Plan).

This action reaffirms our commitment to universal service. It initiates a serious effort to develop a plan which will quickly alert us to any disruptive or deteriorating effects upon the network or universal service. The staff realistically recognizes the problems involved. Several alternatives have been proposed. We earnestly request the comments and assistance of all parties. Participation by state commissions would be most welcome.

Common Carrier
Declaratory Ruling

Petition for declaratory ruling seeking clarification of determination which precludes states from imposing alternative regulatory schemes upon carriers to assure the continued availability of CPE to all subscribers granted to an extent and otherwise denied. Adoption of *Second Computer Inquiry*, 77 FCC 2d 384, preempts application of petitioner's proposal to any carrier subject to structural separation rules.
–NARUC

FCC 83–222

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of

National Association of Regulatory Utility Commissioners Petition for Declaratory Ruling that State Commissions Have Authority to Require Exchange Carriers to Provide and Maintain Basic Telephone Instruments and Associated Inside Wiring

MEMORANDUM OPINION AND ORDER

(Adopted May 12, 1983 Released May 27, 1983)

BY THE COMMISSION: COMMISSIONER QUELLO CONCURRING; COMMISSIONERS FOGARTY AND JONES DISSENTING AND ISSUING STATEMENT; COMMISSIONER SHARP CONCURRING IN THE RESULT.

INTRODUCTION

1. In the *Second Computer Inquiry*,[1] this Commission determined that provision of customer premises equipment (CPE) and related installation and maintenance services were not common carrier services that exchange carriers must provide under tariff. We now have before us a Petition for Declaratory Ruling filed on December

[1] Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 FCC 2d 384 (1980) (Final Decision), *reconsideration*, 84 FCC 2d 50 (1980) (Reconsideration Order), *further reconsideration*, 88 FCC 2d 512 (1981) (Further Reconsideration Order), *aff'd sub nom.* CCIA v. FCC, 693 F.2d 198 (D.C. Cir. 1982), *petitions for cert. filed*, 51 U.S.L.W. 3614, 3615 (U.S. Feb 9, 10 1983) (Nos. 82–1331 & 82–1332).

17, 1982 by the National Association of Regulatory Utility Commissioners (NARUC) seeking clarification of the extent to which that determination precludes states from imposing alternative regulatory schemes upon carriers to assure the continued availability of CPE to all subscribers. In its petition NARUC proposes a specific plan to govern when and how exchange carriers would be required to provide basic telephone equipment, inside wiring and related installation and maintenance services to their subscribers. NARUC seeks a declaratory ruling that there is no conflict between Commission decisions reached in the *Second Computer Inquiry* and a state commission's adopting the NARUC plan to require exchange carriers to act as "suppliers of last resort" to their subscribers requesting basic equipment. For reasons set forth below we are authorizing state commissions to adopt a slightly modified version of the NARUC plan on an experimental basis for a period of two years, but are requiring that its application be restricted to companies not subject to the structural separation requirements now imposed upon the Bell Operating Companies in the *Second Computer Inquiry*.[2]

BACKGROUND

2. In its petition, NARUC proposes that a state utility commission be authorized to require exchange carriers operating within its jurisdiction to provide and maintain upon subscriber request basic one-line telephone instruments[3] and associated inside wiring[4] under the following terms and conditions:

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[2] Under the terms of the Modification of Final Judgment entered in United States v. American Telephone and Telegraph Co., 522 F. Supp. 131 (D.D.C. 1982), *aff'd, sub nom.* Maryland v. United States 51 U.S.L.W. 3628 (U.S. Feb. 28, 1983) (MFJ), AT&T must divest itself of all the BOCs except Cincinnati Bell Inc. (CBI) and Southern New England Telephone Company (SNET). Because of the changed circumstances created by the MFJ we recently concluded that there is no longer a need to require CBI and SNET to establish separate subsidiaries for providing CPE. *See* Motion of Cincinnati Bell Inc. for Declaratory Ruling to Remove Uncertainty of its Status Under the Commission Decisions in the Second Computer Inquiry (Docket No. 20828), FCC 83–74, released Feb. 25, 1983. The MFJ has also caused us to question whether after divestiture there will be need to require the remaining BOCs to provide CPE only through separate subsidiaries. *See* Notice of Proposed Rulemaking in Policy and Rules concerning the furnishing of customer premises equipment, enhanced services and cellular communications services by the Bell Operating Companies, CC Docket No. 83–115, FCC 83–71, released March 4, 1983. If we conclude that these structural separation requirements should no longer be imposed on the BOCs, state commissions choosing to do so could then apply the provider of last resort requirement to these companies for the prescribed period of time also.

[3] NARUC defines "basic one-line telephone instruments" to mean: the type of basic two-way switched telephone instrument which the State Commission determines is necessary to access the network and utilize basic services in nationwide telecommunications. Petition for Declaratory Ruling of the National Association of Regulatory Utility Commissioners (NARUC Petition) at n. 1.

[4] Inside wiring was explicitly excluded from the category of equipment affected by

1. Exchange carriers must provide basic instruments and, if deregulated, inside wiring[5] as well as related installation and maintenance services on a detariffed basis to any subscribers requesting such equipment or services;

2. Regulated services may in no way subsidize the cost of providing the instruments, inside wiring and maintenance services;

3. Carriers must file with their state commissions their current maximum rates for providing basic instruments;

4. Carriers must base their charges for installation and maintenance services on the terms of maintenance contracts or on the actual time expended and materials required. At a commission's discretion, however, travel expenses might be averaged, resulting in a flat charge for all premises' visits;

5. At a commission's discretion, a carrier must offer its customers the option of returning their telephones to it for repair or of requesting repair service on their premises.[6]

NARUC has asserted that without such authorization, universal service as we know it is endangered. It predicts that those dwelling in rural or economically depressed areas and those relying on party-line service may be unable to rely solely on the marketplace to provide the equipment and services they will need to be linked to the public switched network. Because its plan would neither require that the equipment be tariffed nor permit regulated service revenues to subsidize these detariffed offerings, NARUC concludes that its provider of last resort requirement is compatible with our decision that competition rather than traditional rate of return regulation should determine the availability of customer premises equipment and related maintenance services.

3. Sixteen organizations filed comments on the NARUC proposal: American Telephone and Telegraph Company and the Bell System Companies (AT&T); Communications Workers of America (CWA); Computer and Business Equipment Manufacturers Association (CBEMA); Continental Telecom, Inc. (Continental); Centel Corporation (Centel); Florida Public Service Commission (FPSC); Florida Telephone Association (FTA); GTE Telephone Companies (GTE); International Business Machines Corporation (IBM); Illinois Commerce Commission (ICC); Maine Public Utilities Commission (MPUC); Michigan Public Service Commission Staff (MPSCS); North

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the decisions reached in the Second Computer Inquiry. The Commission has taken no action in that or any other docket that would preclude states from exercising the authority over inside wiring that NARUC proposes. In CC Docket No. 79–105, we are weighing whether the public interest would be furthered by our requiring that inside wiring no longer be offered under tariff. It would, however, be premature at this time even to attempt to determine the effect of such a conclusion upon state authority to regulate how and by whom inside wiring is offered. For this reason in the remaining paragraphs of this order we discuss only the facets of the NARUC proposal relating to terminal equipment offerings.

[5] See n. 4 supra.

[6] We shall refer to these conditions collectively as the provider of last resort requirement.

American Telephone Association (NATA); United Telecommunications, Inc. (United); Vermont Department of Public Service (VDPS); and United States Independent Telephone Association (USITA). AT&T, FPSC, MPSCS and NARUC filed reply comments.[7] In their comments the state commissions and CWA urged this Commission to declare that provider of last resort requirements like those NARUC proposed were consistent with the regulatory scheme adopted in the *Second Computer Inquiry*. They echoed NARUC's concern that without such requirements party line users and those living in rural or economically depressed areas could be denied access from their homes to the public switched network and denied that the requirements conflicted with the pro-competitive policies that impelled our actions in the *Second Computer Inquiry*. In their comments, industry associations, telephone companies, and their competitors in the terminal equipment market agreed that provider of last resort requirement posed a substantial threat to the continuing development of competition in that market, albeit for different reasons. They urged this Commission to deny the NARUC petition on procedural and substantive grounds. We now consider the issues raised by these comments and respond to the question presented by the NARUC petition itself.

DISCUSSION

4. Before we consider the substantive issues raised in this proceeding, we first address the procedural issues raised by some commenting parties. FTA and GTE have joined AT&T in asserting that with respect to customer pemises equipment, the NARUC petition is, in fact, not a petition for declaratory ruling but rather an untimely petition for reconsideration of policies adopted in the *Second Computer Inquiry* and should be denied. They claim that declaratory relief is inappropriate here because NARUC presents neither new matter nor a controversy to resolve. We disagree. We note that under our rules, we may issue a declaratory ruling to resolve a controversy or to remove uncertainty. *See* 47 C.F.R. § 1.2. We conclude that in this case a declaratory ruling will remove the uncertainty surrounding whether the provider of last resort requirement NARUC proposes would be in conflict with decisions reached in the *Second Computer Inquiry*.

5. In the *Second Computer Inquiry* we did not preempt all forms of regulation of terminal equipment by the states. We preempted states' attempts to regulate terminal equipment only to the extent that they conflicted with the new regulatory scheme we adopted to replace traditional tariff regulation. That new regulatory scheme has two facets: first, the removal of traditional rate-of-return regulation over CPE and, second, the requirement that if carriers of

[7] Detailed summaries of these comments and replies appear in Appendix A.

the Bell System choose to provide CPE, they do so through a separate corporation satisfying the structural separation requirements of Commission Rule, 64.702, 47 C.F.R. § 64.702. We explicitly reserved judgment on the legality of future attempts by the states to regulate terminal equipment in ways that they perceived to be consistent with our decisions in the *Second Computer Inquiry*, preferring to address such regulatory attempts on an *ad hoc* basis as they appeared. 84 FCC 2d at 103. NARUC has presented us with such a proposal. We must now determine whether the NARUC plan would be in conflict with the regulatory scheme that we have adopted because it appears best able to assure reasonable, efficient communications service in an evolving competitive marketplace.[8]

6. In the *Final Decision* of the *Second Computer Inquiry*, we concluded that provision of terminal equipment, including NARUC's "basic one-line telephone instruments," was not a common carrier service and should be offered separate and apart from a carrier's tariffed services. Henceforth subscribers would rely upon the marketplace to meet their CPE needs. Recognizing that this would substantially alter the way that most telephone users would obtain this equipment, we have remained determined to protect the residential subscriber from any significant temporary dislocation created by this change. To achieve this goal, in the *Final Order*, we had proposed to require that carrier-provided residential CPE continue to be offered at pre-deregulation rates that would be fixed for the life of the instrument. On reconsideration, however, we concluded that an alternative scheme could simultaneously protect residential subscribers and better advance the pro-competitive policies underlying our detariffing decision. We created a "bifurcated" transition plan under which regulatory bodies, telephone companies and, most important, subscribers could adapt to the new environment. Under the plan, we separated CPE into two categories, new and embedded. New CPE, which included all basic one-line telephone instruments acquired by a telephone company or manufactured by its affiliate after January 1, 1983, could not be offered under tariff. Carriers might continue to offer embedded CPE, which

[8] We find it both unnecessary and inappropriate to delay issuing our ruling until a state commission actually adopts the NARUC proposal. *See* Telerent Leasing Corporation, 45 FCC 2d 204, 213 (1974), *aff'd sub nom.* North Carolina Utilities Commission v. FCC, 537 F.2d 787 (1976). We note that at least two states have already imposed a duty to provide CPE upon local carriers withing their jurisdiction. *See* Order No. 11345 in Adoption of Rule 25–4.345, Provision of CPE and inside wire maintenance. Amendment of Rule 25–4.17, Uniform System and Classification of Accounts and Rule 25.469, Maintenance of Plant and Equipment. Repeal of Rule 25–4.222, Station Connections, Fla. P.S.C. Docket No 810235-TP(RA), issued Nov. 22, 1982, and Order in Pa. PUC Docket NO. M-820334, entered Jan. 13, 1983. The Florida Commission's proposal is the subject of a Petition for Declaratory Ruling filed with this Commission by the Florida Telephone Assocation on December 22, 1982 upon which we also act today.. See FCC Public Notice, Mimeo NO. 1644 released January 4, 1983.

included all basic instruments located on a customer's premises or in company inventory on January 1, 1983, under tariff until the end of the transition period.[9]

7. Parties opposing the petition assert that the NARUC plan is clearly inconsistent with the regulatory scheme adopted in the *Second Computer Inquiry*. They point to language in the orders issued in that docket indicating that carriers should have the same status in marketing CPE as that enjoyed by any other equipment vendor, including the right to select those CPE markets, if any, in which they will compete. *See, e.g.*, Comments of GTE at p. 6. We continue to believe that this is the ideal toward which we should strive, and it is an ideal with which the NARUC plan would admittedly conflict. Throughout the *Second Computer Inquiry* we also expressed our commitment to the belief that marketplace forces can ensure that ample CPE is available to all. *See, e.g., Final Decision*, 77 FCC 2d at 446; *Further Reconsideration Order*, 88 FCC 2d at 524. We continue to believe that this will prove to be the case. In the transition period during which responsibility for regulating the terms and conditions under which CPE passes from regulatory commissions to market forces, however, there may be isolated areas in which the dissolution of the traditional relationship between a local carrier and its subscribers raises the potential for selected dislocation that can readily be remedied. We have repeatedly emphasized that:

> This Commission is extremely sensitive to the need to minimize the *potential* for significant dislocations as we proceed to implement our Computer II decision. In going forward with the transition to a deregulated CPE environment, we are mindful of our statutory res[p]onsibilities to protect the interests of the communications ratepayer. (emphasis supplied).

Further Reconsideration Order, 88 FCC 2d at 524.

8. When we ordered that CPE attached to residential party-line service be deregulated, we anticipated future examination of possible network and subscriber safeguards for party line CPE. 84 FCC 2d at 70. Subsequently, however, we concluded that the benefits of further federal intervention in this area, including expansion of our Part 68 Registration Program,[10] were significantly outweighed by the concomitant administrative costs, the increased potential for harm to the network and the declining number of party-line users. See

[9] The length of this transition period is one of the issues that was to be resolved in the proceeding begun to develop the transitional mechanisms for deregulating embedded CPE. *See* Notice of Inquiry in Porcedures for Implementing the Detariffing of Customer Premises Equipment and Enhanced Services, 89 FCC 2d 694 (1981).

[10] The Commission's Part 68 Registration Program, 47 C.F.R. Part 68, sets the technical and procedural standards with which vendors of terminal equipment must comply before their products may be attached to the nationwide telephone network.

Petitions seeking Amendment of Part 68 of the Commission's Rules Concerning Connection of Telephone Equipment, Systems and Protective Apparatus to the Telephone Network, CC Docket No. 81–216, FCC 82–495, released November 12, 1982 (hereinafter "Party Line Order") at para. 98. We determined that standards and conditions governing the interconnection of customer provided equipment to party-line service should remain an issue to be resolved jointly by telephone companies and their state regulatory commissions. *Id.* at para. 100. Having reached this decision, we recognized that if a local carrier and its state commission have not agreed on interconnection conditions or standards and if that carrier were no longer providing CPE to new party-line subscribers or old subscribers needing additional equipment, those subscribers may be unable to satisfy their CPE needs. Concern for such subscribers and the possibility of competitive forces' inability to meet other consumers' CPE need in isolated areas cause us to conclude that we should authorize states perceiving a need to do so to impose the NARUC provider of last requirement for a period ending no later than June 30, 1985 upon carriers not subject to the structural separation requirements of Rule 64.702, 47 C.F.R. § 64.702. Thus would be but one more transitional mechanism that we are employing to protect consumers from any temporary inconveniences that accompany our continuing effort to complete the deregulation of CPE. For reasons that we shall subsequently discuss, we conclude that NARUC's provider of last resort requirement does conflict with the structural separation requirements we imposed upon Bell System Operating Companies in the *Second Computer Inquiry*. See para. 10, *infra*.

9. In their oppositions to the NARUC plan, United and NATA have attempted to compare the provider of last resort requirement to the primary instrument concept that we considered several years ago. *See Implications of the Telephone Industry's Primary Instrument Concept (PIC)*, 68 FCC 2d 1157 (1978). We find such comparisons inapposite. In the *PIC* proceeding, we rejected the idea advanced by the telephone companies that telephone service must be completed through a carrier-supplied telephone handset rather than a handset provided by an independent vendor. In *PIC* we acted to eliminate tariff provisions that would restrict consumers ability to attach non-carrier provided CPE to the network. Acceptance of the primary instrument concept would have compelled a customer, regardless of his personal preference or need, to attach at least one handset provided by his local company. In contrast, the proposal now before us would compel a carrier to provide a handset to a customer because of that customer's preference or need.

10. A more reasonable concern of parties opposing the NARUC plan is that it will permit *de facto* tariff regulation of carrier-provided CPE. Comments had been particularly critical of the requirement that companies file the maximum rates they are

currently charging to provide and maintain CPE. Parties were concerned that state regulators might interject themselves into the decision making process when a carrier concluded that it needed to raise the maximum rates. See, e.g., AT&T Comments at p. 9. We believe that requiring a telephone company to files its maximum rates for CPE with the state Commission is unlikely to offer any real benefit or protection to residential customers. It does, however create at least the potential danger that states could interject themselves into a carrier's CPE pricing decisions. Such state action would clearly conflict with our decision in the *Second Computer Inquiry* that the price of all new CPE should not be subject to regulation by the states. Concluding that the danger of such quasi-tariffing outweighs any benefit that might arise from such informational filings, we shall not permit state commissions to impose this requirement upon carriers in their capacity as providers of last resort even on a transitional basis. We also emphasize that the limited authorization we grant today should not be interpreted as permission for states to impose *de facto* tariff or "quasi-tariff" regulation upon carriers providing CPE. Moreover, because carriers may fulfill their obligations as providers of last resort by reselling the products and services of others (with prices increased to reflect their transaction costs), the requirements should not be too onerous or administratively burdensome.

11. We have already explained why we perceive no inherent conflict between the modified NARUC plan, as a transitional mechanism to be employed in the deregulation of CPE, and the first facet of our scheme. We do perceive a conflict, however, between the NARUC plan and the second facet. Under the *Second Computer Inquiry*, if a BOC (other than CBI or SNET) participates in CPE markets, all of its activities associated with the marketing and provision of such equipment and related services must be conducted through a subsidiary separate from its public utility operations. We have recognized only two narrow exceptions to this rule in order to permit BOC to offer on an unseparated basis new specialized CPE needed by handicapped persons, and CPE required by the Department of Defense. *See American Telephone and Telegraph Company*, FCC 82–580, released January 25, 1983, and *American Telephone and Telephone Company*, FCC 83–143, released April 12, 1983. Beyond this, states are clearly precluded from requiring carriers subject to structural separation requirements to provide new CPE. *Further Reconsideration Order*, at 528. Consequently we find that the regulatory scheme adopted in the *Second Computer Inquiry* preempts the application of the NARUC proposal to any carrier subject to structural separation rules.[11] This conclusion should not result in dislocation or inconvenience to the customers of the BOCs

[11] We note that the *Second Computer Inquiry* does not preclude states from

because these companies have indicated on the record that they remain ready and able to meet their single-line subscribers CPE needs until January 1, 1984, and that after this date, American Bell Inc. will be prepared to do the same. *See* AT&T Comments at pp 5–7. We shall decide well before that date whether the divested BOCs must continue to comply with the separate subsidiary requirements of the *Second Computer Inquiry*. *See* n.2, *supra*. If we conclude that the divested BOCs need no longer comply, a state commission could then apply its provider of last resort rule to a BOC also. If we do not lift the structural separation rules from the divested BOC's, we shall revisit the need to impose some form of a provider of last resort requirement upon these companies also.

12. Parties opposing the NARUC petition have also pointed to the lack of evidence supporting NARUC's conclusion that without state authority to impose the provider of last resort requirement, universal service is endangered. Indeed available information seems to offer more support for the position of parties like Continental who assert that the market place can met subscriber needs.[12] Centel notes the favorable reaction of customers served by its Illinois and Nevada subsidiaries to those carriers' decision to restrict their participation in the CPE market. In predominantly rural Iowa, the state commission recently announced its decision that carriers must proceed to detariff embedded CPE and related services on an expedited basis. *See Iowa Commission Deregulates All Terminal Equipment As Soon As Tariffs Effective*, Telecommunications Rep., Feb. 28, 1983, at 10. Implementation of the NARUC plan under the terms we have set forth provides a reasonable transition mechanism to insure that competition will successfully replace tariff regulation.

ORDERING CLAUSES

13. Accordingly, IT IS ORDERED that pursuant to sections 1, 4(i) and 4(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i) and 154(j), section 554(e) of the Administrative Procedures Act, 5 U.S.C. 554(e), and Commission Rule 1.2, 47 C.F.R. § 1.2, the petition of the National Association of Regulatory Utility Commissioners IS GRANTED to the extent reflected herein and is OTHERWISE DENIED.

14. IT IS FURTHER ORDERED, That the Secretary shall cause this order to be published in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

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requiring the Bell Operating Companies to modify under tariff a terminal device that a subscriber has purchased in the market place in order to make the device compatible with the local network. *See* Party Line Order at para. 100.

[12] See Further Reconsideration Order, 88 FCC 2d at 524, n.16 and 528, n.22.

Appendix A.

Comments

American Telephone and Telegraph Company (AT&T) and the Bell System Companies (BSCs)

1. According to AT&T and the BSCs, the NARUC petition is an untimely request for partial reconsideration of the *Second Computer Inquiry*. The NARUC proposal would undo a major component of *Computer Inquiry II* by authorizing extensive regulatory control over the market for single-line CPE.

2. AT&T and the BSCs assert that NARUC provides no evidence to support its claim that rural and depressed areas will not attract terminal equipment competitors. Pointing to the many existing outlets for CPE available to all, AT&T and the BSCs claim that unregulated CPE suppliers can be expected to serve customers throughout the country. They add that since the NARUC proposal would not control CPE prices, it will not increase the availability of CPE.

3. AT&T and the BSCs note that party-line service continues to decline. Moreover existing Bell Company supplies of equipment that can be used on party lines are extensive. They observe that nothing prevents state commissions and telephone companies from starting to develop party-line standards. They suggest that if the need for party-line equipment should still arise, commissions might be authorized to require a telephone company to provide customers with a list of suppliers of CPE compatible with its party-line requirements.

4. AT&T and the BSCs assert that incentives already exist for vendors to provide installation and maintenance services of high quality and availability; electricians could fill any void. They note that the NARUC proposal would do nothing to limit charges for these services.

5. According to AT&T and the BSCs, the NARUC provider of last resort requirement would continue regulation of the CPE marketplace. If telephone companies must file their current maximum rates for providing CPE and maintenance, this would give state regulators power directly or indirectly over the prices charged for CPE. The NARUC proposal would burden companies not planning to offer CPE or those allowed to do so only through a separate subsidiary. It would give state regulators control over CPE market entry and prices without imposing the obligation they bear under tariff regulation to insure that the regulated firm has the opportunity to recover costs and to earn a fair rate of return on his investment.

6. AT&T and the BSCs describe as economically unsound, the NARUC proposals to give customers the option of requiring premises visits by repair technicians and to permit state regulators to require a flat premises visit charge. They note that the NARUC proposals lack standards to determine when the provider of last resort requirement is needed and a sunset provision. They conclude that for all these reasons the petition should be rejected.

Communications Workers of America (CWA)

7. Characterizing the NARUC proposal as imposing only modest requirements on local telephone companies, CWA expressly supports the NARUC petition. CWA agrees that installation and maintenance charges should be based on maintenance contracts or time and material expended, with travel time for customer premises visits averaged to achieve a flat-rate charge for subscribers in a given franchised area. CWA shares NARUC's concern for subscribers in rural and depressed areas and residential subscribers with non-modular CPE. It finds the conditions NARUC would have imposed on a telephone company supplying CPE and inside wiring to be neither anti-competitive nor monopoly-directed. CWA urges prompt action on the petition to assure that the telephone companies have the time to maintain equipment inventories

and work forces adequate to provide the limited offerings described by NARUC. CWA finds it unlikely that the divested BOCs will seek to re-enter the CPE business, and believes that this will impose hardships on many residential users because no competition in their areas is likely. It notes that NARUC's PLR proposal is like the provider of last resort amendment in H.R. 5858, which CWA describes as "an expression of sound public policy made by a responsible entity of our Government."

Computer and Business Equipment Manufacturers Association (CBEMA)

8. CBEMA asserts that the requirements of the NARUC PLR proposal would directly conflict with policies established in the *Second Computer Inquiry*. It agrees that a declaratory ruling on the lawfulness of such state action is now appropriate to avoid the possibility of state agencies adopting such regulatory programs.

9. CBEMA notes earlier FCC findings that tariff regulation has a negative effect on competition in the CPE market generally and has caused competition to fail to develop in some market segments. Under the NARUC proposal, carrier provision of CPE would be only nominally detariffed. The PLR requirements constitute *de facto* tariff regulation and restrict a carrier's ability to respond to competitive initiatives. The proposal that one entity must provide CPE "flies in the face" of many FCC decisions to the contrary.

10. According to CBEMA, NARUC's suggestion that subscribers in rural and depressed areas need the protection of its proposal is unfounded. NARUC has not shown why the CPE marketplace will not be equally effective in serving such citizens. CBEMA claims that the NARUC proposal is unnecessary to achieve the objectives it seeks. Because such a program would also burden the competitive marketplace so much that would impede federal regulatory goals it must be preempted.

11. CBEMA asserts that the NARUC plan would not serve the public interest. The Commission should declare that adoption of this or analogous regulatory actions by state agencies would be unlawful.

Continental Telecom, Inc. (Continental)

12. The provider of last resort requirement is inconsistent with the *Second Computer Inquiry* because it would impose *de facto* state regulation on exchange carrier provision of CPE and would impair the development of a truly competitive CPE industry. Since the PLR requirement would not lower rural subscriber prices, it offers no public interest benefits. It would, however, either force an exchange carrier to enter a market in which it has concluded it cannot make a profit or would impose immeasurably higher costs on carriers that might have entered the market without the requirement.

13. NARUC Continental claims that there is no basis for NARUC's assumption that telephone companies will be able to provide equipment and services to rural subscribers at affordable prices without a subsidy if competitive suppliers cannot do so. If the marketplace can meet rural subscribers' needs, NARUC's plan is not needed; if the marketplace cannot do so, the plan is a totally ineffective substitute. Continental believes that most rural subscribers will be able to buy equipment and inside wiring by mail order, with do-it-yourself installation. Local electricians can also do installation. Continued regulation of embedded CPE during a reasonable transition period and joint ventures like that of American Bell Inc. and Sears Roebuck should protect rural subscribers.

14. According to Continental, NARUC also overstates the problems of party- line users and underestimates the ability of competitive suppliers to serve rural subscribers. Continental predicts that these suppliers can cope with problems posed by the lack of technical standards by working with telephone companies and state commissions during the transition period.

15. The provider of last resort requirement would impose substantial administrative costs on carriers complying with all the conditions in the NARUC proposal. These conditions are also unnecessary. Requiring filing of maximum rates for CPE might result in state commissions using these schedules to justify lower allowed rates of return. Requiring averaging of travel time costs subsidized customers generating above average travel time costs, an unjust and probably unlawful discrimination.

Centel Corporation

16. The Commission should deny the NARUC petition because the ruling sought would be inconsistent with a fundamental objective of the *Second Computer Inquiry.* The Commission has already considered customer service requirements in concluding that customers should obtain CPE through the competitive market. Centel states that through retail and mail order services, every market is served by multiple vendors. It notes that its customers have reacted favorably to its restricting its role as a CPE provider.

17. The Common Carrier Bureau's public notice concerning CPE deregulation recognizes that the FCC has established for telephone companies the right to compete or not to compete on an equal basis with all other vendors. The PLR requirement conflicts with this policy and would impede the transition to a fully competitive CPE market.

18. The request for the ruling concerning inside wiring is premature.

Florida Public Service Commission (PFSC)

19. The FPSC supports the NARUC petition. It finds the PLR requirement substantially similar to the primary instrument requirement it recently adopted. (Its primary instrument rules require carriers to provide CPE under tarriff for five years.) Both are justified under the universal service mandate and are consistent with the *Second Computer Inquiry.* If the FCC finds the NARUC proposal more acceptable, the FPSC would reform its primary instrument rule to conform to that proposal. It fears that the required transfer of embedded CPE from the BOCs to AT&T will thwart the safeguards of the *Second Computer Inquiry's* bifurcated transition. It notes that other carriers have already depleted their CPE inventory. Florida's large elderly population and rural customer base requires a smooth transition. The FCC should allow state commissions to require optional leasing of basic sets for at least a transitional period to provide a slow withdrawal of the safety net.

Florida Telephone Association (FTA)

20. Because there is no new matter or controversy to resolve, the FCC should dismiss the NARUC petition. The petition seeks reconsideration of decisions reached in the *Second Computer Inquiry* based upon arguments already considered and rejected by the FCC and the appellate court.

GTE Telephone Companies (GTE)

21. GTE opposes the NARUC petition. The petition is an untimely petition for reconsideration of policies adopted in the *Second Computer Inquiry* even before they have been implemented. Those parts of the petition concerning inside wiring should be treated as late- filed comments in CC Docket No. 79–105. There is no controversy or uncertainty, the FCC has expressly rejected the provider of last resort requirement in the *Second Computer Inquiry.*

22. NARUC would impose an "obligation to serve" on all telephone companies, a basic element of utility regulation. The FCC has said that carriers should have the same status in marketing CPE as any other equipment vendor. The FCC considered the situation of rural subscribers and rejected it as a basis for continuing regulation of CPE. The FCC has made clear that carriers are not required to furnish CPE, its

installation or maintenance ubiquitously. NARUC's proposal would require such ubiquitous service.

23. NARUC assumes, without demonstrating, that available inventory will not meet subscriber need for party-line equipment until necessary state commission action can be implemented.

IBM

24. The NARUC petition seeks to reopen the decision to deregulate CPE, lacks merit and should be denied. In the *Second Computer Inquiry* NARUC also opposed CPE deregulation based on its adverse impact on universal service and residential subscribers. The power NARUC seeks for state commissions is meaningful only if coupled with the power to require reasonable rates. NARUC claims not to seek the latter. The informational carrier rate filings required by the NARUC proposal could be a surrogate for a real tariff, which is clearly at odds with the *Second Computer Inquiry.*

Illinois Commerce Commission (ICC)

25. Dissolution of the relationship between telephone companies and their customers may occur before competitive suppliers of CPE, and related installation and maintenance have developed in some areas. Without commenting on the merits of the NARUC plan, ICC supports a ruling that would give state commissions the flexibility to respond with a provider of last resort plan suited to its jurisdiction. The FCC should grant the NARUC petition without prejudice to alternative plans consistent with federal policy.

Maine Public Utilities Commission (MPUC)

26. States need the authority described in the NARUC petition to protect rural subscribers without convenient sources of basic equipment and related services. The MPUC predicts that competitive equipment vendors may never serve these areas and, given the choice, many telephone companies may discontinue providing CPE, inside wiring and related repair services. While permitting competition to work where the marketplace permits, the provider of last resort requirement will protect universal service.

Michigan Public Service Commission Staff (MPSCS)

27. MPSCS supports the NARUC petition. The NARUC proposal sets forth the minimum conditions needed to insure universal, reasonable service during the transition to full deregulation of CPE. Michigan has rural areas that have not and will not for some time attract CPE vendors and in which the telephone companies wish to discontinue (at least to newcomers) services covered by the petition. New customers will thus experience delay in obtaining CPE and all customers will face repaid delays as embedded supplies are depleted. Without standard for party-line equipment, the PLR requirement is necessary because competitors will be unable to meet the existing, widely varied technical conditions that such equipment must satisfy.

North American Telephone Association (NATA)

28. According to NATA, the NARUC petition is premature. There is no factual support for NARUC's statements concerning the unavailability of CPE, inside wiring and related installation and maintenance services for subscribers in rural or depressed areas. There is evidence that it is in the carrier' interest to see that telephones remain available. Even if there are no local suppliers, mail order sales and service are available, and inside wiring can be handled by electricians. With respect to the charge for installation and maintenance, there is no evidence of the effect of a flat premises visit charge. NATA fears that this flat charge could be an incentive for cross subsidization from monopoly service revenues.

29. If the alleged problem did arise, the NARUC proposal is unlikely to solve it. Without control of the price that a carrier charges for equipment and related services, there is no guarantee of universal availability.

30. NATA opposes the petition as an attempt to dilute the FCC's policy decisions reached in the *Second Computer Inquiry*. Granting the petition would encourage other *ad hoc* exceptions to the basic competitive framework of those decisions.

United Telecommunications, Inc.

31. The NARUC petition is inconsistent with the *Second Computer Inquiry* and otherwise without merit. Under the NARUC proposal, state commissions would regulate new CPE acquired by telephone companies after January 1, 1983. The FCC has preempted such regulation. The NARUC proposal is based on the same concepts as PIC, except for its applying only at the customer's option. It is objectionable for the same reasons the FCC earlier rejected PIC. Because the bifurcated approach to CPE deregulation will protect customers, the provider of last resort requirements is unneeded.

32. The installation and maintenance requirements proposed by NARUC are inconsistent with the concept of deregulated CPE. They foreclose customer opportunity to obtain competitive maintenance from other suppliers and impose an unfair burden on local carriers trying to compete against totally unregulated vendors. The petition should be rejected.

Vermont Department of Public Service (VDPS)

33. VDPS supports the NARUC petition. It fears that unless some action is taken, party-line service will be eliminated. VDPS predicts that the option of party-line service will become even more important in the future. But without registration guidelines, non- Bell CPE cannot be connected to the network. There is insufficient assurance that without the provider of last resort requirement, party-line CPE will remain available in rural states like Vermont. The FCC should at least require telephone companies to modify CPE on request to make it suitable for party-line service.

United States Independent Telephone Association (USITA)

34. USITA opposes the NARUC request for four reasons. First, the independents intend to compete in the CPE market but have no wish to be the source of CPE when no one else is interested. Second, the request would handicap telephone companies in the competitive marketplace. Competitors could use the "no subsidy" rule to embroil local carriers in regulatory proceedings, while having to average travel time places these carriers at a competitive disadvantage in less rural, more densely populated areas. Third NARUC's concern about equipment and service unavailability is not founded in fact. By itself the telcos' pure self-interest (based on investment in telephone plant in service) would compel them to assure that their customers could find needed CPE. Finally, the powers NARUC seeks are expressly preempted by the Commission's *Computer Inquiry - II* decision; which when read with the *Telerent Leasing* and *CPE Registration* orders unquestionably establishes the principle of federal preemption in this area.

REPLY COMMENTS

American Telephone and Telegraph Company (AT&T)

35. AT&T asserts that NARUC does not support the FCC's policy to meet the public's need for CPE by opening the CPE marketplace to competition. It notes that others commenting agree that the petition is a procedurally unsound attempt to have the FCC reconsider its procompetitive policy before it has a chance to work. It also asserts that there is no evidence to support the suggestion that competing suppliers

will not serve consumers. It notes that ABI is already marketing CPE to customers in urban, suburban and remote rural areas and adds that business incentives will compel local telephone companies to offer CPE if no one else does. (p. 3)

36. According to AT&T, the NARUC proposal will not increase the availability of CPE, but will impose unnecessary burdens on exchange carriers. In particular the plan to require installation and maintenance visits on subscriber request and to bill for travel time on a flat basis is economically unsound. The petition should be rejected.

Florida Public Service Commission (FPSC)

37. The FPSC distinguishes its "optional" primary instrument plan from the mandatory primary instrument plan rejected in the past by this Commission. Since the FPSC plan was not expressly addressed in the *Second Computer Inquiry*, the FCC can find the plan consistent with the *Second Computer Inquiry* and justified on public policy grounds. It notes that no one has produced evidence of any damage resulting from the FPSC rule. It adds that the public benefits of the transitional "CPE cushion" created by its rule outweighs any alleged detriment to the *Computer II* deregulatory scheme. Restating arguments made in its earlier comments, the FPSC concludes that its rule is a rational, consistent extension of the FCC's concern for transistional continuity. The FPSC cautions that the FCC must be sensitive to avoid chilling legitimate state action with regard to CPE.

Michigan Public Service Commission (MPSC)

38. According to MPSC, because it is limited to the provision of only basic single-line instruments, the NARUC proposal would not thwart competition; it would only assure residential subscribers at least one easily accessible source for customer premises equipment. NARUC's concern is for those areas that vendors of telephone equipment will not target. The NARUC proposal would not continue CPE regulation because all new equipment would be provided on a deregulated basis, state commissions would be setting prices for no equipment and monopoly services would not subsidize the carriers' CPE business.

39. The MPSC notes that as soon as February, 1983 the embedded inventory of many Michigan telephone companies will be depleted. The MPSC questions whether the states can set standards for CPE to be attached to party lines when the FCC could not do so. It assets that a provider of last resort requirement for party line CPE is necessary when there are no likely vendors for such equipment other than the telephone company, and adds that many Michigan residents can only be served by party lines.

40. According to MPSC, the NARUC proposal is not an attempt to create incentives for customers to use telephone company CPE, but only an effort to assure that such service is available. If independent suppliers can offer that service for less, the customer should be the beneficiary. (p. 3)

41. MPSC notes that the premises visit charge covers only travel costs, not repair costs. The difference between the average cost charged and the actual cost incurred for a premises visit would be recovered from other customer premises visits. It adds that average prices are much easier to administer and would probably be preferred by most companies. The MPS believes that denying the petition will not enhance competition and granting it would not seriously jeopardize this goal and would assure universal service, a principle that the Commission must enforce and therefore with which the *Second Computer Inquiry* must be consistent. The Commission should grant the petition.

National Association of Regulatory Utility Commissioners (NARUC)

42. The NARUC asserts that ready availability of CPE posited by opponents to the NARUC petition is refuted by their suggestion that subscribers obtain CPE and

related services through mail orders. Mail order service, with the inevitably accompanying delays, is an inadequate substitute for a present vendor. During the delay in their receiving either their new or repaired CPE, subscribers depending exclusively on mail order service would be denied access to the network.

43. Those opposing a flat premises visit charge ignore its benefits and suggest only problems that need not occur. NARUC does not propose to subsidize travel costs by monopoly revenues, and emphasizes that only travel costs could be subject to the averaging requirement. NARUC finds opponents' concerns about the effect of the maximum charge list excessive and misplaced. If it would allay their fears, NARUC would amend its language to say that maximum rates changes may be filed "when the company determines them to be necessary." The lists' purpose would be solely to provide information.

44. NARUC believes that the provider of last resort option would ensure the ready availability of products and services essential to access of the telephone network. It would neither impede CPE competitors from entering any market nor would it subject the prices telephone companies charged for these services and equipment to regulation. The petition should be granted.

DISSENTING STATEMENT OF COMMISSIONER JOSEPH R. FOGARTY

In Re: National Association of Regulatory Utility Commissioners Petition for Declaratory Ruling that State Commissions Have Authority to Require Exchange Carriers to Provide and Maintain Basic Telephone Instruments and Associated Inside Wiring.

The Commission's decision is a classic profile in lack of courage. And, it is wrong. Under mounting political pressure, the Commission has capitulated to previously rejected arguments. In so doing, the Commission has adopted an order which contradicts its stated policy of promoting full and fair competition in the customer premises equipment (CPE) market. To permit the States to require independent telephone companies[1] to be providers of last resort will place on the affected companies an intolerable burden. Moreover, this order will send the public the wrong signal as to whether or not the Commission really believes in its competitive policies and is willing to pursue them in the face of controversy.

In the *Final Decision* in the *Second Computer Inquiry*, this Commission made a public policy determination to deregulate CPE based on a finding that tremendous benefits would accrue to the public from a competitive marketplace.[2] In order to implement this policy and avoid the cross-subsidies and other predatory activities that could thwart competition, as well as to make available to the

[1] Although this decision at present applies only to independent companies, I anticipate that after the Commission resolves the pending Inquiry in *American Telephone and Telegraph Company*, FCC 82–580, released January 25, 1983, the rule will apply to the divested BOCs as well.

[2] *See Final Decision, Second Computer Inquiry*, 77 FCC 2d 381, 438 (1980).

consumer lower-cost, more innovative CPE, we found "that a carrier should have the same regulatory status in marketing CPE as any other equipment vendor and this should be reflected in our regulatory scheme."[3] Additionally, we stated that "the separation of CPE from common carrier offerings and its resulting deregulation will provide carriers the flexibility to compete in the marketplace on the same basis as any other equipment vendor."[4] We reiterated these points on further reconsideration where we reaffirmed that "[t]he provision of new CPE is not a continuation of a common carrier public utility service. Common carrier obligations do not attach to the offering of such equipment."[5]

It is a non-sequitur for the Commission now to conclude that the flexibility granted the States under the provider of last resort doctrine is consistent with Commission policies because that equipment would not be tariffed. Under *Computer II* all CPE vendors are to compete on an equal basis. However, under the NARUC plan only independent telephone companies would be subject to the tremendous burden of having to be the provider of last resort and would be denied the flexibility that the Commission found to be so important.[6] None of their competitors will be so burdened and constricted.

This decision has been justified on the grounds that it is transitional and that there will be no burden on the companies because they will not have to maintain an inventory. First, it is not at all clear that the decision is merely transitional. In 1985, the Commission will be subject to the same pressures to which it has surrendered in this instance. Consequently, the real possibility exists that, faced with such demands, the Commission will find sufficient "good cause" to extend the grant of permission to the States.

The burden issue is even more troubling. Some assert that there will be no requirement for the companies to maintain an inventory. Instead, they suggest that when requests are received a telephone company can simply purchase retail CPE and then resell it on a marked-up basis to a consumer. It seems odd that the Commission would encourage sale of marked-up CPE to consumers when these consumers could procure the same CPE from the same source as the telephone company but at a lower price. This is unrealistic. In order to meet their regulatory-imposed obligation, providers of last resort will have to maintain costly inventories that they would not have otherwise maintained. In all probability these telephone companies will not be reimbursed for all the costs connected with this service. This obligation will prove to be one more obstacle in the path of

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[3] *Final Decision* at 446.

[4] *Final Decision* at 447.

[5] *Further Reconsideration Order, Second Computer Inquiry*, 88 FCC 2d 512, 528 (1981).

[6] *See Final Decision* at 446.

independent telephone companies striving to compete with their unfettered competitors. The fact that the rule may be transitory is unimportant. By the end of the first transition period, these competitors will have had two more years to devote all their resources to the development of their competitive position, while the independents will be forced to divide their resources in an uneconomic fashion—an anticompetitive result contrary to our *Computer II* policies.[7]

It should not be forgotten that under the NARUC plan States will be encouraged to force the independent companies to use basic services and equipment to subsidize last resort services and CPE in order to keep the rates for these services and equipment low. Otherwise, the provider of last resort concept makes no sense because it is clear that a consumer willing to pay any amount can get CPE.

The truth is that for the first time the Commission here has realized the enormity of the *Computer II* decision. Out of an abundance of fear, the Commission will signal the Congress, the courts and the public that we are not at all certain what the impact will be on the public. However, it is too late to retreat. Confusion now will result only in hampering telephone company-based competition and will encourage the reconsideration of a host of questions decided long ago. If, on the other hand, the Commission is serious about reconsidering the impact of CPE deregulation, then we should require those States that adopt the provider of last resort rule to apply it to all CPE suppliers, not only to the local exchange carriers.

If we have the courage of our convictions, we should move forward to full competition and full deregulation. This order implements no transition as suggested. In my last effort at didacticism here at the Commission, I point out that the word "transition" comes from the latin verb "transire" which means to pass over from one place to another. By the adoption of this order we are not passing over, we are retreating in full public view. A sorry precedent is established here which the Commission will come to regret.

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[7] I question the legality of the Commission's action on another ground as well. Since the Commission has declared that the provision of CPE is no longer subject to Title II of the Communications Act and that national policy requires that CPE providers not be subject to regulation, it is clear, based on *GTE Service Corp.*, that the Commission would lack authority to order carriers to provide unregulated CPE. *See GTE Service Corp. v. FCC*, 474 F.2d 724, 733 (1973). Consequently, it is uncertain in light of the Commission's abolition of regulation on national policy grounds, that the States could order carriers to provide equipment where the FCC could not. Further, in *Commercial Communications, Inc.*, the Commission struck down an Oklahoma Corporation Commission rule which would have permitted the Oklahoma Commission to determine what area or segment of the State unregulated CPE suppliers—like the independents—could serve, as well as the practices the suppliers could use. *See Commercial Communications, Inc.*, 81 FCC 2d 106 (1980). The rule that we adopt in this order would, in essence, permit the States to exercise such power, at least with respect to telephone companies.

This in all probability is the final chapter in my commentary on the evolution of competition in telephony. I think it proper, therefore, to use one last line in the FCC Reports to express my gratitude and appreciation to my staff and to the staff of the Common Carrier Bureau for their challenging assistance during my tenure on the Commission.

DISSENTING STATEMENT OF COMMISSIONER ANNE P. JONES

IN RE: National Association of Regulatory Commissioners Petition for Declaratory Ruling that State Commissions Have Authority to Require Exchange Carriers to Provide and Maintain Basic Telephone Instruments and Associated Inside Wiring.

I strongly dissent from the Commission's action approving the "carrier of last resort" proposal for customer premises telephone equipment. I see nothing here that shows a need for this action, and I fear that it will send an unfortunate signal that this agency is not committed to its decision to encourage development of a CPE market free from unnecessary regulatory intervention.

The majority's decision purports to be a "transitional" mechanism that will "protect" the public until the states can feel secure that CPE is widely available from sources other than the phone company. I do not believe that such a transition is necessary. It is apparent to me, if not to my colleagues, that independent sources of CPE are readily available to any telephone user. Quite apart from the fact that telephones are available in retail outlets ranging from specialty shops to supermarkets, phones also are available through catalogs to anyone who can receive mail. Thus the assumption that underlies the states' insecurity, that subscribers will not be able to obtain phones unless telephone companies are forced to supply them, is pure nonsense. Moreover, it is contrary to the specific finding made by the Commission in the *Computer II* decision "that there has now developed a strong viable market for equipment which assures users a wide range of competitive alternatives." *Amendment of Section 64.702 of the Commission's Rules and Regulations* (*Computer II Final Decision*), 77 FCC 2d 384, 453 (1980).

The majority's decision also contradicts *Computer II* in a much broader sense. In *Computer II* the Commission attempted finally to sever the terminal equipment market from basic telephone service. It concluded that the public interest would be served best if the CPE market became fully competitive. To accomplish this, the *Computer II* rules sought to remove all unnecessary regulatory presence in that market and ensure that carriers "should have the same regulatory status in marketing CPE as any other equipment vendor .

. . " 77 FCC 2d at 446. The majority's decision backs away from that resolve.

This decision permits state regulators to reverse the business decision of a carrier not to enter the CPE market. I see no basis for believing that such regulation will produce public benefit. If a carrier has decided that it should not participate in the equipment market, presumably its decision was based on its conclusion that such participation would not be profitable. Thus, if forced by the state PUC to participate in the CPE market, contrary to its business judgment, the carrier will either offer the equipment to the customer at a price that the customer is unlikely to accept or offer it below cost and attempt to camouflage the subsidy it must derive from its other services. The "high price" option will not make telephone equipment any more available to the public and the "below cost" option is inimical to the development of a fully competitive CPE market. Neither alternative will protect the public, and the latter will surely harm it.

Because I see only negative potential in this decision, I must dissent.

Hearing, Necessity for
Ownership and Management, Integration of
Reconsideration, Petition for, Denial of
Review by Review Board

Review Board denied petitions for reconsideration and affirmed Decision granting FM broadcast application. Applicant permitted to substitute the deceased principal's son, who had been previously proposed for less than full-time integration, into the father's full-time role. Petitioners raised no new facts requiring additional hearing.
–*Peoples B/cing Corporation*
BC Docket No. 78–243

FCC 83R–33

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
PEOPLES BROADCASTING CORPORATION Indianapolis, Indiana	BC Docket No. 78–243 File No. BPH-9958
RADIO CIRCLE CITY, INCORPORATED Indianapolis, Indiana	BC Docket No. 78–244 File No. BPH-10014
MEDIACOM, INC. Indianapolis, Indiana	BC Docket No. 78–245 File No. BPH-10036
RADIO CORPORATION OF INDIANA Indianapolis, Indiana	BC Docket No. 78–246 File No. BPH-10047
INDIANAPOLIS COMMUNICATIONS CORPORATION Indianapolis, Indiana	BC Docket No. 78–247 File No. BPH-10066
For Construction Permit for a New FM Broadcast Station	

MEMORANDUM OPINION AND ORDER

(Adopted: April 27, 1983; Released: May 3, 1983)

BY THE REVIEW BOARD:

1. In a Decision released on January 25, 1983 (FCC 83R-5, 92 FCC 2d 1255) (hereinafter "Decision"), this Board affirmed the ALJs' final choice (Initial Decision, FCC 82D-39, released May 18, 1982) (hereinafter "*ID.*") and granted the application of Peoples Broadcasting Corporation for authority to construct a new FM broadcast station to operate on Channel 300 at Indianapolis, Indiana. Now before the Board for consideration are: (a) petition for reconsideration, filed February 24, 1983, by Mediacom, Inc.; (b) petition for reconsideration, filed February 24, 1983, by Radio Corporation of Indiana (hereinafter "RCI Br."); (c) partial opposition to (a) filed March 21, 1983, by Radio Corporation of Indiana; (d) partial opposition to (b) filed March 21, 1983, by Mediacom, Inc. (hereinafter "Mediacom Opp."); (e) opposition to (a) and (b) filed March 21, 1983, by Peoples Broadcasting Corporation; (f) motion to strike portions of (d) filed March 28, 1983, by Peoples Broadcasting Corporation; (g) opposition to (f) filed April 8, 1983 by Mediacom, Inc.; (h) reply to (c) and (e) filed March 31, 1983 by Mediacom, Inc.; (i) reply to (d) filed March 31, 1983 by Radio Corporation of Indiana; (j) petition for leave to amend filed February 7, 1983 by Peoples Broadcasting Corporation; (k) opposition to (j) filed February 14, 1983 by Radio Corporation of Indiana; (1) petition for leave to amend filed January 18, 1983 by Radio Corporation of Indiana; and (m) petition for leave to amend filed April 26, 1983 by Peoples Broadcasting Corporation. For reasons that follow, the Board will deny the petitions for reconsideration and affirm its *Decision* granting the application of Peoples Broadcasting Corporation. Also, we grant the Peoples and RCI petitions for leave to amend because they timely report changes in information furnished to the Commission in compliance with 47 CFR § 1.65, and do not affect the comparative position of the applicants. Finally, although Peoples has motioned to strike portions of Mediacom opposition on technical grounds, we will deny its motion and consider Mediacom's points as decisional.

2. In their requests for reconsideration, petitioners raise arguments, most of which have been thoroughly considered and resolved by the Board. Because it is well-established that reconsideration is not available "merely for the purpose of again debating matters on which the [deciding body] has once deliberated and spoken, "*WWIZ, Inc.*, 37 FCC 685, *aff'd sub nom. Lorain Journal Co.* v. *FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966), we decline to rehash the issues again. *Ad abundantiorem cautelam*, we will take the opportunity to illuminate the arguments directed to crediting Peoples with the integration of Daniel Cantor as a substitute for his deceased father. It is upon such integration credit that petitioners

aim the vortex of their fire, and it is upon such credit that this case may turn.

3. Our *Decision* (at paras. 26–31) traced the circumstances of Peoples' proposed integration model and noted that its principal owner (45.5%) and president, Joseph Cantor, had passed away in the midst of this proceeding. By operation of the *post-mortem* arrangements following the death, his son, Daniel Cantor, who was initially figured to hold a 42% interest in Peoples and to be, *inter alia*, a company director[1], came into certain of his father's interests sufficient to raise the son's current holding in the applicant to (at least) his deceased father's level, *i.e.*, 45.5%.[2] Although originally specified as a full 42% owner, Daniel Cantor was not slated—as was his father—for full-time integration into the management of the station. *I.D.*, para. 93; *Decision*, para. 31. Thus, the ALJs found that Daniel Cantor would "integrate a minimum of 30 hours per week to the proposed radio facilities and is prepared to spend up to 60–70 hours a week should his responsibilities require it." *I.D.*, para. 93. This finding was based on Daniel Cantor's testimony that he was "prepared to devote as many as 70 hours, 60 variable with need." *Decision* at n.29, *quoting* Tr. 904.[3] Whereas a 40 hour per week commitment is necessary for full-time integration credit, *Midwest Broadcasting Co.*, 70 FCC 2d 1489, 1495 (Rev. Bd. 1979), and 20 hours

[1] *See I.D.*, paras. 85, 90.

[2] *Decision*, para. 27. Another proposed integrated owner of Peoples, Andrew C. Johnston, held a 10% interest prior to Joseph Cantor's death, *I.D.*, para. 85; but, as a result of *post-mortem* option agreements, Johnston increased his interest to 46.5%. *Decision*, para. 27. While taking reporting notice of Johnston's increase in ownership, the Board refused to raise Peoples' overall integration credit from its originally proposed 58% so as not to permit a comparative "upgrading." *Id.*, at n.30.

[3] At the time of the hearing (1979), Daniel Cantor was a 24 year old M.B.A. candidate at Indiana University. *I.D.*, para. 90. He was, however, slated even then to be assistant treasurer and a director of Peoples. *Id.* Although the value of Daniel Cantor's proposed integration was questioned at hearing on the ground that he might be too young and inexperienced to play any meaningful managerial role, *see Decision*, para. 31, we found that none of the parties specifically challenged his hourly commitment *per se*. *Id.*, at n.29.

RCI now submits that Daniel Cantor's hourly commitment was challenged, citing to "ICC Exceptions at 6, RCI Exceptions at 12 n.11." RCI Br. at n.4. We have examined those exceptions, just as we did prior to our *Decision*, and (again) find that neither exceptor factually challenged the ALJs' finding that Daniel Cantor was prepared to devote 60–70 hours per week. Parties are entitled to a "reasonable opportunity" to file exceptions to an initial decision, 5 U.S.C. § 557(c); but, "[a]ny objection [to an initial decision] not saved by exception . . . is waived," 47 CFR § 1.277(a). While ICC did contend that a grant of credit beyond 30 hours to Daniel Cantor would be gratuitous, ICC Exceptions at 6, it pointed to nothing on the record (or elsewhere) that cast doubt on Daniel Cantor's larger commitment. ICC's complaint was, therefore, hardly a cognizable exception which "point[ed] out with particularity alleged material errors in the decision . . . [or] contain[ed] specific references to the page or pages of the transcript of hearing, exhibit or order if any on which the exception is based." 47 CFR § 1.277(a).

per week delineates part-time participation which entitles the applicant to only a slight credit, *id.* at 1495 & n.10, a 30 hour commitment is considered "substantial." *Radio Greenbrier, Inc.*, 80 FCC 2d 107, 123 n.33 (Rev. Bd. 1980); *Flint Family Radio, Inc.*, 69 FCC 2d 38, 41 (Rev. Bd. 1977) ("30 hours per week constitutes a *substantial* amount of time on a daily basis and is therefore entitled to credit") (emphasis added); *see also Webster-Baker Broadcasting Co.*, 88 FCC 2d 944, 956 (Rev. Bd. 1982) (a 30 hour commitment is entitled to "disproportionate significance" in evaluating integration credit). However, by a series of amendments filed in the fall of 1981, Peoples notified the Commission of the death of Joseph Cantor, the ownership changes indicated above, the election of Daniel Cantor to succeed his father as Peoples' president and chief executive officer, and of its intention to substitute the son as a full-time integrated owner in lieu of his father. *Decision*, para. 27.

4. Relying on a general line of Commission precedent which, in the case of the death of an applicant principal occurring during the pendency of a proceeding, permits the transfer of the deceased principal's interest to another principal so long as no comparative "upgrading" occurs,[4] the Board permitted the substitution of Daniel Cantor to allow Peoples to merely maintain its originally proposed 58% full-time integrated ownership structure.

5. On the other hand, the Board would not (1) permit Peoples to retain a 42% part-time credit for Daniel Cantor's originally proposed "substantial" integration (*see Decision* at n.30) while at the same time claiming his father's full-time position (*id.*); or (2) permit Peoples to increase its full-time integration credit above its originally proposed 58% by dint of Andrew C. Johnston's *post-mortem* increase in ownership from 10% to 46.5% (*see id.* and *supra* note 2). In this posture, then, Peoples was neither penalized in full-time credit because of the elder Cantor's death nor was it "upgraded." However, Joseph Cantor's death did degrade Peoples' integration credit somewhat: it cancelled the additional 42% part-time credit for Daniel Cantor which Peoples would have garnered had Joseph

[4] *See Decision*, paras. 28–30, *citing Mid-Florida Television Corp.*, 76 FCC 2d 158 (1980); *Rose Broadcasting Co.*, 68 FCC 2d 1242 (1978); *Azalea Corp.*, 38 FCC 2d 95 (Rev. Bd. 1972).

In *Mid-Florida*, the latest of the so-called "death" cases, the Commission permitted two originally slated principals to acquire the interest of a principal who died while the proceeding was before the Board. Although the expired principal was specified throughout the hearing as the station's full-time manager, the Commission permitted the *post-mortem* substitution by the other principals so that the applicant could maintain its overall level of integrated ownership. 76 FCC 2d at 163. Noting that the *Mid-Florida* applicant had been degraded qualitatively with respect to its integration (a result inuring to Peoples in this case, *see infra* para. 5), the Commission allowed a different principal to claim the role of station manager and to succeed to (part of) the interest of the deceased principal without further evidentiary hearing. 76 FCC 2d at 164.

Cantor lived; and, it extinguished the additional enhancing credit Peoples would have been due for Joseph Cantor's history of civic activities in Indianapolis.[5]

6. Despite the fact the permitted substitution of Daniel Cantor for his late father did not "upgrade" Peoples pre-existing 58% full-time integration proposal, and petitioners were in no way blind-sided or prejudiced in confronting Peoples as a 58% integrated competitor, petitioners object to the posthearing substitution for several reasons. First, it is claimed that because Daniel Cantor initially proposed "a minimum of 30 hours per week," he may not be permitted to now claim a full-time role. In support, petitioners rely on *Midwest Broadcasting Co., supra.*[6] Second, petitioners submit that allowing Daniel Cantor full-time credit after the conclusion of the hearing denies them due process and the collateral right to cross-examine the son on his commitment. In that connection, petitioners go so far as to contend that even though Daniel Cantor was thoroughly cross-examined on his 30-plus hours per week commitment, *see, e.g.*, Tr. 902-906, their questioning of him might have been somehow different had that commitment been for 40 hours.[7]

7. Astonishingly, and despite their instant protests on the

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[5] The Commission's *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 396 (1965) affords extra comparative credit for the integration of individuals who have a laudable record in the civic affairs of the proposed community of license on the logical premise that such persons already have a demonstrated commitment to the problems and activities of the very community to which the licensee must direct its attentions.

[6] RCI Br. at 6–7; Mediacom Opp. at 4. We do not view *Midwest* as squarely relevant to the question before us. It is true that in *Midwest*, which was not a "death" case, the Review Board refused to credit the part-time integration proposals of several principals who testified to a commitment of "10–20 hours per week." 70 FCC 2d at 1495 & n.11. The Board stated:

> Where the work proposals are stated in terms of a minimum and a maximum amount of time to be devoted to the station, *e.g.*, 10–20 hours per week, only the minimum or lesser amount of time will be credited, since the commitment can be met with the lesser number of hours.

Id., at n.11. Ordinarily, of course, that rule is sound. However, the operative question before the Board right now is whether, in light of the equitable imperatives of *Mid-Florida, supra* note 4 (and other "death" cases), it is reasonable to infer from the pre-existing record evidence that Daniel Cantor can and will devote the 40 hours. Whereas the principals in *Midwest* proposed their 20 hours per week as a "maximum" integration, and the variable less, Daniel Cantor stated his 30 hours as a "minimum", with a variable of 60–70 hours per week. *See I.D.*, para. 93; *Decision*, para. 31 & n.29.

[7] RCI complains: "The considerable difference in those proposals would clearly necessitate cross-examination of a substantially different nature." RCI Br. at 6. *See also* Mediacom Opp. at 8. A similar argument was made and rejected by the Commission in *Mid-Florida*. There, the parties claimed that they would have cross-examined the substitute station manager differently at hearing. 76 FCC 2d at 164. Noting that the substitute had already been examined at hearing and that nothing appeared to impair the substitute's ability to fulfill the role of the deceased principal, the Commission gainsaid the need for further hearing. *Id.*

grounds that the posthearing transposition of credit denied them their rights of cross-examination of Daniel Cantor on this matter, petitioners assert that a remand for further evidentiary hearing over this would be wasteful. Thus, RCI states:

> At this late date, four years after the hearing, it is beyond dispute that holding further evidentiary hearing would unduly disrupt this proceeding and prejudice the other applicants by requiring them to expend additional time and expense and delaying grant of the construction permit.

RCI Br. at 10. Likewise, Mediacom stipulates:

> As to the possibility of remand and reopening the record to take new evidence on these factual questions, the disruption, expense and delay of that approach is evident. No applicant has deemed such a reopening to be the best way to resolve the substitution issue, nor have the ALJs or the Review Board considered it advisable. Mediacom agrees with that assessment.

Mediacom Opp. at 5.

8. The distillation of petitioners' position is accordingly: (1) they do not allege, even in the barest form, that Daniel Cantor will not commit (at least) the 40 hours his unchallenged hearing testimony clearly purports; (2) that a remand for hearing on this question would be undesirable; and (3) that, notwithstanding (1) and (2), Daniel Cantor should not be credited for full-time integration in place of his deceased father and that Peoples should forfeit entirely the major portion of its integration because of Joseph Cantor's death. That position is inequitable, illogical, and untenable. *See generally Rose Broadcasting, supra*; *Mid-Florida Television, supra*; *Azalea Corp., supra*. We suppose that irrespective of petitioners' express disinclination, a remand on the question of Daniel Cantor's hourly commitment could be ordered just as a matter of form. As a matter of fact and as a matter of law, no further hearing is really warranted.

9. As a matter of fact, and as suggested above, petitioners did not, at hearing, seriously challenge Daniel Cantor's representation that he was "prepared to devote as many as 70 hours, 60 variable with need"; they did not, in their exceptions to the initial decision, directly challenge the ALJs' finding that the younger Cantor would "integrate a minimum of 30 hours per week to the proposed radio facilities and is prepared to spend up to 60–70 hours a week should his responsibilities require it" (*see supra* note 3); and, even to this day, petitioners do not allege by way of knowledge, information and belief, rumor, or paranatural divination that Daniel Cantor will be unable to devote, or will not devote, 40 hours weekly to station operation.

10. As a matter of law, it is important to reflect that the standard utilized in assaying an applicant's integration profile is merely whether the evidence provides "reasonable assurances" that a certain integration level will be met. *New Continental Broadcasting Co.*, 88 FCC 2d 830, 838 (Rev. Bd. 1981). And, the Commission

does not question the quantitative integration representations of an applicant's principal unless there surfaces contradictory evidence tending to impeach such representations. *See, e.g., New Continental Broadcasting Co.*, FCC 83–159, released April 13, 1983, at para. 5, *remanding on other grounds* 88 FCC 2d 830. In general also, parties to an application proceeding seeking to challenge a grant on factual grounds bear some minimal burden of demonstrating a serious factual question. *See, e.g.*, 47 U.S.C. §309(d)(1) (parties seeking to challenge a license grant must make "specific allegations of fact . . . supported by affidavit of a person or persons with personal knowledge thereof"). Once a case has been submitted, parties desirous of reopening the record for further inquiry must produce facts which are new. *See, e.g., Kern Radio Dispatch*, 29 FCC 1079, 1081 (1960), *aff'd sub nom. Kidd* v. *FCC*, 302 F.2d 873 (D.C. Cir. 1962).[8] As the courts have stated, evidentiary hearings are necessary only where there are seriously contested issues of fact, not merely inferences to be drawn therefrom. *See, e.g., Stone* v. *FCC*, 466 F.2d 316, 322–23 (D.C. Cir. 1972). Even where "[c]ontradictory allegations and affidavits . . . create some possibly unresolved factual issue[s]," an evidentiary hearing is not invariably necessitated. *Broadcast Enterprises, Inc.* v. *FCC*, 309 F.2d 483, 485 (D.C. Cir. 1968). And, "Congress intended to vest in the FCC a large discretion to avoid time consuming hearings in this [licensing] field . . .." *Southwestern Operating Co.*v. *FCC*, 351 F.2d 834, 835 (D.C. Cir. 1965). In exercising such "discretion," the agency's judgment is "paramount." *Columbus Broadcasting Coalition* v. *FCC*, 505 F.2d 320, 324 (D.C. Cir. 1974).

11. The instant petitions do not at all contradict Daniel Cantor's testimony quoted at *Decision*, n. 29; if anything is challenged, it is our inference that when Daniel Cantor testified that he could and would devote "70 hours, 60 variable with need," the death of his father supplied that "need." Under any ordinary circumstances, the occasion of a son stepping into his deceased father's shoes as a president of a jointly owned enterprise is, in the course of human events, quotidian. Petitioners allege nothing to suggest that the ordinary circumstances do not obtain in this case or that there is no "reasonable assurance" (*New Continental Broadcasting, supra*) that Daniel Cantor will devote, at least, the 40 hours per week he previously indicated. Conversely, we believe that any fair consideration of the evidence and the exigencies here compels an inference that Daniel Cantor is—without challenge—ready, willing, and able to devote the 40 hours per week requisite to full-time credit.

12. In view thereof, no ostensible purpose would be served by remanding this matter for hearing, a hearing petitioners avidly do

[8] It should be borne in mind as well that parties seeking reconsideration, as do petitioners here, should demonstrate "manifest error" in the prior decision. *WWIZ, supra*, 37 FCC at 686.

not seek in any event (*see supra* para. 7). And, although petitioners conjecture that they might have examined Daniel Cantor differently at hearing had they known that he was considering full-time (40 hours) integration rather than "substantial" (30 hours) integration, *see Flint Family Radio, supra*; *Radio Greenbrier, supra*, they do not even hint at why, or how, their examination would have differed. Petitioners' suppositions in this respect transcend speculation; they are in the realm of haruspication.

13. In sum, petitioners know of nothing that would impede Daniel Cantor's 40 hour commitment and they also know that they do not want a further evidentiary hearing to test what they do not know. All petitioners know, for certain, is that they do not want Peoples to maintain its *status quo ante* by way of a consubstantial realignment occasioned by Joseph Cantor's death. We will acknowledge that the policy of allowing a posthearing substitution of one proposed integrated principal for a deceased principal is, to some extent, imperfect; it would be ideal if the world stood still while we consummated our frequently lengthy proceedings.[9] But, the ultimate result sought by petitioners under the situation at bar is as illogical as it is unjust. We continue to believe that our actions were realistic, based on reasonable inferences drawn from the pre-existing record, consistent with precedent, and manifestly more just than the relief petitioners solicit.

14. ACCORDINGLY, IT IS ORDERED, That the petitions for leave to amend filed February 7 and April 26, 1983 by Peoples Broadcasting Corporation ARE GRANTED, and the amendments ARE ACCEPTED; and

15. IT IS FURTHER ORDERED, That the petition for leave to amend filed January 18, 1983 by Radio Corporation of Indiana IS GRANTED, and the amendment IS ACCEPTED; and

16. IT IS FURTHER ORDERED, That the motion to strike filed March 28, 1983 by Peoples Broadcasting Corporation IS DENIED; and

17. IT IS FURTHER ORDERED, That the petitions for reconsideration filed February 24, 1983 by Mediacom, Inc. and Radio Corporation of Indiana ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION
NORMAN B. BLUMENTHAL, *Member, Review Board*

[9] This comparative licensing proceeding to replace the licensee found unfit because of, *inter alia*, political fraud in *Star Stations of Indiana*, 51 FCC 2d 95 (1975), was commenced in 1978. *I.D.*, para. 1.

Financial Qualifications
Satellite Domestic Communications
Satellite Launch Authority
Satellite Orbit

Applications to construct and launch space stations in Domestic Fixed Satellite Service granted conditioned on demonstration of firm financial qualifications. Proposal consistent with Commission's policies and serves the public interest, convenience and necessity.
–*Rainbow Satellite, Inc.*

FCC 83–191

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of the Applications of RAINBOW SATELLITE, INC. For Authority to Construct, Launch and Operate Space Stations in the Domestic Fixed-Satellite Service	File Nos. 1453-DSS-P/LA-82 1454-DSS-P/LA-82 1455-DSS-P-82

ORDER AND AUTHORIZATION

(Adopted: April 27, 1983 Released August 3, 1983)

BY THE COMMISSION: COMMISSIONER JONES ABSENT

1. Rainbow Satellite, Inc. (RSI) has filed applications to construct and operate a new domestic satellite system. RSI proposes to construct three satellites. It has requested authority to launch two of those satellites. The third would be reserved as an on-ground spare. Public notice of these applications was given on May 12, 1982. Comments were filed by Advanced Business Communications, Inc. (ABCI) and American Satellite Company (ASC). For the reasons discussed below, we grant RSI's applications.

2. RSI, a newly created corporation, is owned equally by Trexar Corporation and Rainbow Communications, Inc.[1] RSI proposes to

[1] Trexar Corporation is a publicly held corporation which is principally engaged in providing financial services and equipment leasing. Rainbow Communications, Inc. is a California corporation involved in providing telecommunications consulting and engineering services.

launch and operate two satellites in the 12/14 GHz frequency bands. Each satellite will be equipped with 16 transponders. All transponders will have a 54 MHz usable bandwidth. The satellites have a mission design life of at least 8 years. Launches of the operational satellites are scheduled for August and November 1986. RSI does not anticipate service to Alaska, Hawaii or Puerto Rico, but does request the colocation of one of its satellites with the SATCOM III-R domestic satellite at 131° West Longitude. This will allow RSI to also offer cable programming service at 12/14 GHz to those cable television systems that access the SATCOM satellite at 4/6 GHz. RSI also plans to provide business services utilizing customer-provided terminal facilities, such as voice, video, audio and data services. All RSI facilities will be offered on a non-common carrier sale or long-term lease basis.[2]

3. RSI estimates the cost of the space segments to be $217 million, with preoperational expenses of $3.79 million and first year operating costs of $2.33 million for the space segment. It believes that as a new corporation it will have to rely on debt financing. According to RSI, a number of banking and financial institutions have expressed some interest in participating in RSI's financing.

4. In its comments, ASC questions RSI's financial capabilities to construct and operate a satellite system. ASC asks that the Commission establish threshold financial criteria that must be met before an application is approved. This would include a firm funding commitment from an applicant or its parent, supported by verifiable financial statements demonstrating sufficient capacity to go forward on the commitments, or an irrevocable commitment from a financial institution. Under these criteria ASC contends that RSI is, at present, financially unqualified. In response, RSI proposes that each license be conditioned on the satellite being promptly constructed and launched. Failure to comply with this condition would result in automatic forefeiture of all outstanding authorizations for the satellite in question. This, RSI observes, will further the Commission's open entry policy by allowing smaller entities to enter the domestic satellite market. Other issues raised with respect to this proposal and the processing of these applications are fully resolved in the *Report and Order* in CC Docket No. 81–704, FCC 83–184, and *1983 Orbit Assignment Order*, FCC 83–186, both adopted today, and we will not repeat that discussion here.[3]

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[2] RSI indicates that it does not contemplate an indiscriminate public marketing of its facilities. It does not, however, supply all the information required in Domestic Fixed Satellite Transponder Sales, 90 FCC 2d 1238 (1982), to allow us to determine that such offering is consistent with that decision. Therefore, RSI must be prepared to offer its services on a common carrier basis until such time that it receives authorization to operate on a noncommon carrier basis.

[3] We believe that this decision, along with our decision in Domestic Fixed Satellite Services, 90 FCC 2d 1 (1982), *recon. denied*, and the Memorandum Opinion and

5. In related actions taken today, we have reduced orbital spacings between domestic satellites in the 4/6 GHz and 12/14 GHz bands so that additional satellites might be accommodated in orbit to satisfy growing demands for domsat services. *See Report and Order, supra.* We are taking these actions to continue the opportunities for initial entry by new companies such as RSI into the domestic satellite market, as well as to provide for the expansion of existing systems already in place. Under these new criteria, we are able to grant all of the applications in the current processing group under our open entry domestic satellite licensing policies. Thus, we are able to grant it without the need to resort to a comparative hearing. However, we recognize that RSI has not yet been able to adequately demonstrate full financial qualifications to construct and operate its proposed system. We have also addressed this issue in today's *Report and Order, supra,* and have decided that conditioned grants, rather than denial or evidentiary hearings will better serve the public interest in the prompt and efficient supply of domestic satellite services in the future. Consequently, we will issue construction and launch authorizations to RSI conditioned on their demonstrating their full financial qualifications, as set forth in our *Report and Order, supra,* no later than December 31, 1983. In the event that RSI has not fulfilled this requirement by that date, the authorizations will automatically become null and void.

6. Accordingly, IT IS ORDERED that Application File Nos. 1453-DSS-P/LA-82, 1454-DSS-P/LA-82 and 1455-DSS-P-82 ARE GRANTED and Rainbow Satellite, Inc. IS AUTHORIZED to construct three domestic communication satellites in accordance with the terms, conditions and technical specifications set forth in its applications, and the formal instruments of authorization to be issued at a later date.

7. IT IS FURTHER ORDERED that Rainbow Satellite, Inc. IS AUTHORIZED to launch and operate two space stations in the domestic Fixed-Satellite Service in accordance with the *1983 Orbit Assignment Order,* FCC 83–186, adopted today.

8. IT IS FURTHER ORDERED that these authorizations will become null and void in the event Rainbow Satellite, Inc. fails to demonstrate its financial qualifications by December 31, 1983 in accordance with the policies and criteria specified in the *Report and Order,* FCC 83–184, adopted today in CC Docket No. 81–704.

9. IT IS FURTHER ORDERED that Rainbow Satellite, Inc. shall

Order, FCC 83–183, adopted today, are fully dispositive of any arguments raised with respect to the processing of these applications. This also includes issues raised concerning the application of our *1980 Processing Order,* 77 FCC 2d 856 (1980), and any potential hearing rights that might be granted under the *Ashbacker Doctrine. See* Ashbacker Radio Corporation v. FCC, 326 FCC 2d 327 (1945). Moreover, our *1983 Orbit Assignment Order,* FCC 83–196, resolves all issues raised by the parties relating to particular orbit assignments.

comply with all the requirements of the *Report and Order* in CC Docket No. 81–704, FCC 83–184 and *1983 Orbit Assignment Order*, FCC 83–186, both adopted today.

10. IT IS FURTHER ORDERED that, unless extended by the Commission for good cause shown, each of these authorizations shall become null and void in the event the space station is not constructed, launched and successfully placed into operation in accordance with the technical parameters and terms and conditions of this authorization, and no later than the following dates specified in the applications for these facilities:

	Construction Commenced	*Construction Completed*	*Launch (No later than)*
RSI I	July 31, 1984	June 30,1986	August 31, 1986
RSI II	November 30, 1984	September 30, 1986	November 30, 1986
RSI III	September 30, 1984	March 31, 1987	(ground spare)

11. IT IS FURTHER ORDERED that the temporary assignment of any orbital location to Rainbow Satellite, Inc. is subject to change by summary order of the Commission on 30 days notice and does not confer any permanent right to the use of the orbitor spectrum. Such a change may be ordered *inter alia* to implement uniform 2 ° separations, to require colocation of in-orbit satellites in the event of excess spare capacity, or to implement any of the objectives or policies set forth in today's *Report and Order*, FCC 83–184, in CC Docket No. 81–704, or *1983 Orbit Assignment Order*, FCC 83–186. Neither this authorization, nor any right granted by this authorization, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, or by transfer of control of any corporation holding this authorization, to any person except upon application to the Commission and upon a finding by the Commission that the public interest, convenience, and necessity will be served thereby.

12. Rainbow Satellite, Inc. is afforded thirty days from the date of release of our *Report and Order*, *supra*, to decline these authorizations as conditioned. Failure to respond within that period will constitute formal acceptance of the authorizations as conditioned.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Satellite Domestic Communications
Satellite Launch Authority
Satellite Orbit

Applications to construct and launch space stations in Domestic Fixed Satellite Service granted conditioned on maintenance of sufficient traffic fill on the RCA American Communications satellite system. Proposal is consistent with Commission's policies and serves the public interest, convenience and necessity. *–RCA American Communications*

FCC 83–192

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of the Applications of RCA AMERICAN COMMUNICATIONS, INC. For Authority to Construct, Launch and Operate Space Stations in the Domestic Fixed-Satellite Service and Sell Transponders on a Noncommon Carrier Basis	File Nos. 1810-DSS-LA-81 604-DSS-P/LA-82 1457-DSS-P/LA-82 1458-DSS-P/LA-82 1459-DSS-P/LA-82 1460-DSS-P-82 525-DSS-ML-83

ORDER AND AUTHORIZATION

(Adopted: April 27, 1983 Released: August 4, 1983)

BY THE COMMISSION: COMMISSIONER JONES ABSENT

1. The Commission is considering the above captioned applications submitted by RCA American Communications, Inc. (RCA Americom). The first two are requests to launch and position a fifth 4/6 GHz domestic communications satellite (File No. 1810-DSS-LA-81) and to construct, launch and position a sixth 4/6 GHz domestic communications satellite (File No. 604-DSS-P/LA-82). Public notice of these two applications was given on August 19, 1981 and January 6, 1982, respectively. We are also considering RCA Americom's

request to sell up to three additional transponders on the SATCOM IV satellite.[1] A Petition to Deny Application File No. 1810-DSS-LA-81 was filed by Western Union Telegraph Company (WUTC). Additionally, comments were filed by American Satellite Company (ASC), COMSAT General Corporation (COMSAT), Eastern Microwave, Inc. (EMI), Hughes Communications, Inc. (HCI), Satellite Syndicated Systems (SSS), and Southern Pacific Communications Company (SPCC). Petitions to deny application File No. 604-DSS-P/LA-82 were filed by WUTC and SPCC. Comments were also filed by ASC. The remaining applications are for authority to construct a three in-orbit and one ground spare 12/14 GHz domestic satellite system. Public notice of these applications was given on May 12, 1982. Comments were filed by ASC and Advanced Business Communications, Inc. (ABCI). For the reasons discussed below, we deny the petitions and grant RCA Americom's applications.

2. RCA Americom is currently authorized to operate a four in-orbit domestic satellite system in the 4/6 GHz bands. It is currently assigned the orbital positions of 83 °, 131 °, 139 ° and 143 ° West Longitude, and was also granted authority to construct two satellites as on-ground spares.[2]

3. In File No. 1810-DSS-LA-81,[3] RCA Americom has applied for authority to launch and position its on-ground spare as a fifth in-orbit satellite. It requests the 66 ° W.L. orbital location or any orbital position in the 4/6 GHz band capable of serving the 48 contiguous United States. Construction of the satellite is due to be completed in July 1983 with launch scheduled in August 1983. In application File No. 604-DSS-P/LA-82 RCA Americom has applied for authority to construct and launch a sixth in-orbit satellite. It will accept any orbital location in the 4/6 GHz band capable of serving the contiguous United States. If the Commission should adopt 2 ° or 3 ° spacing then it would like an assignment in the prime are not adjacent to another RCA satellite. Construction of the satellite is due

[1] File No. 525-DSE-ML-83. An opposition was filed to this request by Satellite Syndicated Systems.

[2] *See* RCA Global Communications, 56 FCC 2d 660 (1975), and RCA Americom Communications, 75 FCC 2d 531 (1979) and 84 FCC 2d 633 (1981). RCA Americom was provided authority to temporarily operate its first two satellites launched during 1976 at 119 ° W.L. and 135 ° W.L. until the non-RCA satellites assigned those orbital positions in 1980 were ready to be deployed. Hughes Communications, which has been allocated the 135 ° W.L. position, will be ready for operation in June 1983. SPCC, which has been allocated the 119 ° W.L. position, will be ready for operation in February 1984. After that time, under its existing authorizations, RCA Americom would be restricted to four orbit locations. Also, RCA Americom has sold one of its four previously authorized satellites to Alascom. *See* Alascom, Inc., FCC 82T-25, released October 25, 1982.

[3] The submission assigned this file number updates the deferred portion of RCA Americom's earlier application assigned file number 1087-DSE-P/LA-80 that was treated in RCA American Communications, 84 FCC 2d 633 (1981). Our action here disposes of that deferred request for launch authorization.

to be completed in April 1986 with launch scheduled for May 1986. The design will be similar to that used for RCA Americom's fifth in-orbit and replacement satellites with the exception of several changes. It will have 24 transponders, each with a bandwidth of 36 MHz. Design changes include solid state amplifiers, more efficient antenna design, elliptic function filters, and increase in power of all transponders to 8.5 watts. This should increase the mission life from seven to ten years. The costs of constructing and launching the two satellites are estimated to be $152.8 million.

4. RCA Americom also requests authority to construct and operate three new satellites in the 12/14 GHz frequency bands and to construct a fourth 12/14 GHz satellite to be used as an on-ground spare. Each satellite will be equipped with 16 operational 20-watt transponders and four back-up transponders. All transponders will have a 54 MHz usable bandwidth. Linear cross-polarization will be employed for dual polarized reception and transmission. Ground coverage will be only of the continental United States with 38–42 dBW EIRP. RCA Americom requests assignment of orbital positions in the eastern arc to ameliorate the adverse impact of precipitation on signals in the Gulf states region. It also requests that these locations be contiguous, or nearly so, to reduce the complexity of spacecraft and system design and operation. Additionally, it would like to co-locate one of its 12/14 GHz band spacecraft with its 4/6 GHz SATCOM IV spacecraft, currently located at 83 ° W.L. The first 12/14 GHz satellite is scheduled for launch in May 1985, with the other two satellites scheduled for launch in October 1985 and May 1987. The ground spare would be available for launch by January 1988. The satellites have a nominal 10 year life span. The estimated cost of the 12/14 GHz satellite system is $393.4 million.[4] According to RCA Americom all of the transponders on the newly proposed satellites will be offered to the public on a common carrier basis. Authority is requested (File No. 525-DSS-ML-83), however, to sell up to three additional transponders on the previously authorized SATCOM IV satellite for a total of eight.[5] These are the only transponders which are currently proposed to be offered for sale on any of the previously authorized or proposed RCA Americom satellites.

5. The comments and petitions regarding these satellite applications focus on whether RCA Americom has demonstrated sufficient traffic requirements to warrant the award of the additional orbital

[4] The financial qualifications of RCA Americom and its parent to construct, launch and operate the satellites proposed in these applications are a matter of record before the Commission and are not in question in this proceeding.

[5] RCA Americom was previously authorized to sell five transponders on the SATCOM IV satellite. *See* Domestic Fixed Satellite Transponder Sales, 90 FCC 2d 1238 (1982).

position requests. Moreover, several of the parties questioned the Commission's procedures for processing domestic satellite applications if a mutually exclusive situation were to exist. Other issues raised with respect to these proposals and the processing of these applications are fully resolved in the *Report and Order* in CC Docket No. 81–704, FCC 83–184, and *1983 Orbit Assignment Order*, FCC 83–185, both adopted today, and we will not repeat that discussion here.[6]

6. In light of the reduced spacing criteria for 4/6 GHz and 12/14 GHz adopted to day in our *Report and Order, supra*, we are able to accommodate all of the applications, including RCA Americom's, in the current processing group under our open entry policies. Because such applications may be granted without the need to resort to a comparative hearing, the only remaining issue raised by these applications is whether RCA Americom has demonstrated sufficient need to warrant these additional orbital locations.

7. In support of these applications, RCA Americom claims to have immediate foreseeable customer needs that cannot be even partially met unless the applications are granted. RCA Americom indicates that it has over 175 outstanding requests for transponder leases for its 4/6 GHz SATCOM satellites. RCA Americom also proposes to offer 12/14 GHz transponder services to a wide variety of users. These include teleconferencing, video and voice distribution to CATV and SMATV systems and DTS/DEMS services. According to RCA Americom, the technical features of these satellites are particularly attractive for these growing markets because of the dimunition of terrestrial radio frequency interference and the ability to use small earth station antennas at 12/14 GHz. To some extent, RCA Americom's traffic projections at 4/6 GHz can be based on the historical development of its services since the the SATCOM satellites were initially launched. However, we recognize that RCA Americom's traffic projections for the 12/14 GHz satellites are significantly more speculative. We also recognize that the long-lead time involved in the construction of a satellite system requires somewhat speculative assessments of the market for domestic satellite services.

8. Consequently, we have no reason at this time to disagree with RCA Americom's assessment of its future capacity needs. Nor are we in a position where we must evaluate the requirements of RCA

[6] We believe that this decision, along with our decision in Domestic Fixed Satellite Services, 90 FCC 2d 1 (1982), *recon. denied*, and the Memorandum Opinion and Order, FCC 83–183, adopted today, are fully dispositive of any arguments raised with respect to the processing of these applications. This also includes issues raised concerning the application of our *1980 Processing Order*, 77 FCC 2d 856 (1980), and any potential hearing rights that might be granted under the *Ashbacker Doctrine*. *See* Ashbacker Radio Corporation v. FCC, 326 FCC 2d 327 (1945). Moreover, our *1983 Orbit Assignment Order*, FCC 83–196, resolves all issues raised by the parties relating to particular orbit assignments.

Americom vis-a-vis another applicant since we can accommodate all orbit requests pending at the time we issued our *1982 Processing Order*, 90 FCC 2d 1 (1982), with additional locations remaining for new entrants or further expansion of authorized systems. Since these satellites can be accommodated in the orbital arc without the need for comparative hearings, we will grant the necessary authorizations. However, as set forth in the *Report and Order* in CC Docket No. 81–704, we are reserving the authority to rectify any orbit use inefficiencies that might result should RCA Americom's traffic projections not materialize. Thus, if RCA Americom's projections of firm customer requirements do not materialize, we will require that any excessive spare satellites be colocated.

9. In addition, for the reasons set forth in the *Report and Order* in CC Docket No. 81–704, FCC 83–184, and our decisions in *Domestic Satellite Transponder Sales*, *supra* note 4, we are providing authority to RCA Americom to sell up to three additional transponders on the SATCOM IV satellite on a noncommon carrier basis.

10. Accordingly, IT IS ORDERED that Application File No. 604-DSS-P/LA-82 IS GRANTED, and RCA American Communications, Inc. is authorized to construct a sixth 4/6 GHz domestic communication satellite in accordance with the terms, conditions and technical specifications set forth in its application and the formal instrument of authorization to be issued at a later date.

11. IT IS FURTHER ORDERED that RCA American Communications, Inc. IS GRANTED authority to launch and operate two additional 4/6 GHz satellite space stations in the domestic Fixed-Satellite Service in accordance with the *1983 Orbit Assignment Order*, FCC 83–186, adopted today.

12. IT IS FURTHER ORDERED that Application File Nos. 1457–1459-DSS-P/LA-82, and 1460-DSS-P-82 ARE GRANTED and RCA American Communications, Inc. is authorized to construct four 12/14 GHz space stations in accordance with the terms, conditions and technical specifications set forth in its applications and the formal instruments of authorization to be issued at a later date.

13. IT IS FURTHER ORDERED that RCA American Communications, Inc., IS GRANTED authority to launch and operate three 12/14 GHz space stations in the domestic Fixed-Satellite Service in accordance with the *1983 Orbit Assignment Order*, FCC 83–186, adopted today.

14. IT IS FURTHER ORDERED that RCA American Communications, Inc., shall comply with all the requirements of the *Report and Order* in CC Docket No. 81–704, FCC 83–184, and *1983 Orbit Assignment Order*, FCC 83–186, both adopted today, as well as the terms and conditions of all other previous orders and authorizations.

15. IT IS FURTHER ORDERED that, unless extended by the Commission for good cause shown, each of these authorizations shall become null and void in the event the space station is not

constructed, launched and successfully placed into operation in accordance with the technical parameters and terms and conditions of this authorizations, and no later than the following dates specified in the applications for these facilities:

	Construction Commenced	*Construction Completed*	*Launch no later than*
SATCOM II R	* * *	July 31, 1983	August 31, 1983
SATCOM VI	November 30, 1983	April 30, 1986	May 31, 1986
12/14 GHz I	January 31, 1983	February 28, 1985	May 31, 1985
12/14 GHz II	January 31, 1983	July 31, 1985	January 31, 1986
12/14 GHz III	January 31, 1985	February 28, 1987	August 31, 1987
12.14 GHz IV	February 28, 1985	January 31, 1988	(ground spare)

16. IT IS FURTHER ORDERED that RCA American Communications, Inc. IS AUTHORIZED to sell up to three additional transponders on its SATCOM IV satellite as proposed in its application and in accordance with the policies articulated in *Domestic Fixed Transponder Sales*, 90 FCC 2d 1238 (1982).

17. IT IS FURTHER ORDERED that the temporary assignment of any orbital location to RCA American Communications, Inc. is subject to change by summary order of the Commission on 30 days notice and does not confer any permanent right to the use of the orbitor spectrum. Such a change may be ordered *inter alia* to implement uniform 2 ° separations, to require colocation of in-orbit satellites in the event of excess spare capacity, or to implement any of the objectives or policies set forth in today's *Report and Order*, FCC 83–184, in CC Docket No. 81–704, or *1983 Orbit Assignment Order*, FCC 83–186. Neither this authorization, nor any right granted by this authorization, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, or by transfer of control of any corporation holding this authorization, to any person except upon application to the Commission and upon a finding by the Commission that the public interest, convenience, and necessity will be served thereby.

18. IT IS FURTHER ORDERED that the Petitions to Deny filed by Southern Pacific Communications and Western Union Telegraph Company ARE DENIED.

19. RCA American Communications, Inc. is afforded thirty days from the date of release of our *Report and Order*, *supra*, to decline these authorizations as conditioned. Failure to respond within that period will constitute formal acceptance of the authorizations as conditioned.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Satellite Domestic Communications
Satellite Launch Authority
Satellite Orbit

Applications to construct and launch space stations in Domestic Fixed Satellite Service granted conditioned on maintenance of sufficient traffic fill on the SBS satellite system. Proposal consistent with Commission's policies and serves the public interest, convenience and necessity.
–*Satellite Business Systems*

FCC 83–193

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of the Applications of SATELLITE BUSINESS SYSTEMS For Authority to Construct, Launch and Operate Space Stations in the Domestic Fixed-Satellite Service	File Nos. 1461-DSS-LA-82 1462-DSS-P/LA-82

ORDER AND AUTHORIZATION

(Adopted: April 27, 1983 Released: August 4, 1983)

BY THE COMMISSION: COMMISSIONER JONES ABSENT

1.+mThe Commission is considering the above-captioned applications filed by Satellite Business Systems (SBS) to launch a fourth domestic satellite, and to construct and launch a fifth satellite. Public notice of these applications was given on May 12, 1982. Comments were filed by American Satellite Company and Advanced Business Communications, Inc. For the reasons discussed below, we grant SBS' applications.

2. SBS is a partnership of wholly owned subsidiaries of COMSAT General Corporation, International Business Machines Corporation and Aetna Casualty Insurance Company. In 1977, the Commission authorized SBS to construct a domestic satellite system consisting of two in-orbit satellites and one on-ground spare.[1] Subsequently,

[1] Satellite Business Systems, 62 FCC 2d 997 (1977), *aff'd sub nom* United States v. Federal Communications Commission, 652 F.2d 72 (D.C. Cir. 1980).

launch authority was provided for a third in-orbit satellite[2], and construction authority was provided for a fourth satellite to be used as an on-ground spare.[3] The SBS satellites all operate in the 12/14 GHz bands and presently occupy the orbital positions of 100 °, 97 ° and 94 ° West Longitude. Each satellite contains ten 43 MHz transponders. The SBS satellites have been designed to provide communications services within the contiguous United States. Each of these spacecraft are designed for an operational life of at least seven years. SBS has been offering service on a common carrier basis since March 1981, and now provides voice, data, facsimile and video teleconferencing services to various business and governmental organizations on a tariffed basis.

3. In Application File No. 1461-DSS-LA-82, SBS requests authority to launch and operate its on-ground spare, which is currently under construction, as a fourth in-orbit satellite. The technical characteristics of this satellite are identical to those of SBS' existing three satellites. This satellite is scheduled to be launched in July 1984. In Application File No. 1462-DSS-P/LA-82, SBS requests authority to construct, launch and operate a fifth in-orbit satellite for service beginning by the first quarter of 1986.[4] SBS proposes several design modifications for this fifth satellites. In particular, SBS proposes to add four wideband transponders (110 MHZ bandwidth, with 120 Mbps transmission capacity) transmitting in a vertical polarization through a dual-polarized antenna subsystem, with spare TWTA's to ensure redundancy and reliability, larger fuel storage tanks to permit a 10 year satellite lifetime and an upgraded electrical battery subsystem, utilizing advanced nickel cadmium battery design. SBS estimates the costs of constructing and launching SBS-4 and SBS-5 at $50 million and $60 million, respectively. Annual segment operating costs range between $2.2 and $4 - 8 million.[5] With slight relocations of existing SBS satellites in orbit and the assignment of 92 ° and 96 ° West Longitude to these new satellites, SBS requests five contiguous orbit positions so that it could operate its satellites satisfactorily with only 2 ° orbital separations.

4. The comments question SBS' need for a fourth and fifth

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[2] *See* Satellite Business Systems, FCC 82–489 released November 10, 1982.

[3] Satellite Business Systems, FCC 81–464 released October 5, 1981.

[4] GSAT believes that the SBS amendment to add transponders constitutes a major change, and therefore cannot be considered within the processing group established by Domestic Fixed Satellite Service, 90 FCC 2d 1, (1982). As explained in our *Report and Order* adopted today in CC Docket No. 81–704, FCC 83–184, we find GSAT's position unpersuasive since no new frequency bands or orbital locations are requested.

[5] SBS' financial, legal and technical qualifications to launch and operate communications satellites are matters of record before the Commission, and are not at issue in this proceeding.

orbital location. Parties believe that SBS provided insufficient evidence to substantiate its growth projections.[6] They further argue that the design of SBS' satellites is out-moded and inefficient. With only ten transponders of 43 MHz bandwidth, it is claimed that the fourth satellite should remain as an on-ground spare. The parties also inquire whether the proposed number of spare transponders in the SBS system is excessive. Other issues raised with respect to this proposal and the processing of these applications are fully resolved in the *Report and Order* in CC Docket No. 81–704, FCC 83–184, and *1983 Orbit Assignment Order*, FCC 83–186, both adopted today, and we will not repeat that discussion here.[7]

5. SBS believes that its customer requirements dictate the need for these additional satellites. Furthermore, it believes that it should be allowed to launch its present on-ground spare even though it is not at the vanguard of technological innovation in satellite design. SBS points out that the constant evolution of satellite technology makes it impossible to have each satellites design at the cutting edge of technology. SBS does indicate, however, its intention to improve the efficiency of the design of its proposed fifth satellite. Finally, SBS asserts that its spare transponder plan is not excessive. It has one back up for each operating channel frequency regardless of the number of satellites on which the frequency is being reused. Such reliability is considered crucial to its marketing plans.

6. As a result of our decisions in today's *Report and Order*, *supra*, to reduce orbital spacings in the 12/14 GHz bands, all of the applications in the current processing group can be accommodated under our open entry policies for licensing domestic satellites. Nevertheless, we are somewhat concerned about the relatively low level of utilization presently being made of the three SBS satellites currently in orbit as reflected in data submitted to the Commission. SBS has, however, submitted projections of required transponder capacity that would indicate the need for additional satellites between 1984 and 1986. We recognize that, because of the lead time involved, it is necessary to plan as much as three years into the future if a carrier is to meet its customer requirements at such later dates. We are also concerned about the efficient use of limited orbital

[6] They point to our 1980 Orbit Assignment Order, 84 FCC 2d 584, 603 (1980), as the appropriate standard.

[7] We believe that this decision, along with our decision in Domestic Fixed Satellite Services, 90 FCC 2d 1 (1982), *recon. denied*, and the Memorandum Opinion and Order, FCC 83–183, adopted today, are fully dispositive of any arguments raised with respect to the processing of these applications. This also includes issues raised concerning the application of our *1980 Processing Order*, 77 FCC 2d 856 (1980), and any potential hearing rights that might be granted under the *Ashbacker Doctrine*. *See* Ashbacker Radio Corporation v. FCC, 326 FCC 2d 327 (1945). Moreover, our *1983 Orbit Assignment Order*, FCC 83–196, resolves all issues raised by the parties relating to particular orbit assignments.

locations by SBS satellites. However, we recognize some of its limitations in improving a satellite design developed a number of years ago and take note of the increased capacity of the SBS-5 modified design.

7. Consequently, we have no reason at this time to disagree with SBS' assessment of its future capacity needs and satellite design and operating decisions. Nor are we in a position where we must evaluate the requirements of SBS vis-a-vis another applicant since we can accommodate all orbit requests pending at the time we issued our *1982 Processing Order*, 90 FCC 2d 1 (1982). Consequently, since these satellites can be accommodated in the orbital arc without the need for comparative hearings, we are going to grant SBS the necessary authorizations to expand its system to five in-orbit satellites. However, as set forth in the *Report and Order*, *supra*, we are reserving the authority to rectify any orbit use inefficiencies that might result should SBS's traffic projections not materialize. Thus, if SBS' projections of firm customer requirements do not materialize, we will require that any excess spare satellites be colocated.

8. Accordingly, IT IS ORDERED that Application File No. 1462-DSS-P/LA-82 ARE GRANTED, and Satellite Business Systems IS AUTHORIZED to construct a fifth domestic communication satellite in accordance with the terms, conditions and technical specifications set forth in its application and the formal instrument of authorization to be issued at a later date.

IT IS FURTHER ORDERED that Satellite Business Systems IS GRANTED authority to launch and operate a fourth and fifth 12/14 GHz satellite space station in the domestic Fixed-Satellite Service in accordance with the *1983 Orbit Assignment Order*, FCC 83–186, adopted today.

10. IT IS FURTHER ORDERED that Satellite Business Systems shall comply with all the requirements of the *Report and Order* in CC Docket No. 81–704, FCC 83–184, and *1983 Orbit Assignment Order*, FCC 83–186, both adopted today, well as the terms and conditions of all other previous orders and authorizations.

11. IT IS FURTHER ORDERED that, unless extended by the Commission for good cause shown, each of these authorization for an in-orbit satellite shall become null and void in the event the space station is not constructed, launched and successfully placed into operation in accordance with the technical parameters and terms and conditions of this authorization, and no later than the following dates specified in applications for these facilities:

	Construction Commenced	*Construction Completed*	*Launch no later than*
SBS IV	* * *	April 30, 1984	September 30, 1984
SBS V	June 30, 1983	February 28, 1986	June 30, 1986

12. IT IS FURTHER ORDERED that the temporary assignment

of any orbital location to Satellite Business Systems is subject to change by summary order of the Commission on 30 days notice and does not confer any permanent right to the use of the orbitor spectrum. Such a change may be ordered *inter alia* to implement uniform 2° separations, to require colocation of in-orbit satellites in the event of excess spare capacity, or to implement any of the objectives or policies set forth in today's *Report and Order*, FCC 83–184, in CC Docket No. 81–704, or *1983 Orbit Assignment Order*, FCC 83–186. Neither this authorization, nor any right granted by this authorization, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, or by transfer of control of any corporation holding this authorization, to any person except upon application to the Commission and upon a finding by the Commission that the public interest, convenience, and necessity will be served thereby.

13. Satellite Business Systems is afforded thirty days from the date of release of our *Report and Order* to decline these authorizations as conditioned. Failure to respond within that period will constitute formal acceptance of the authorizations as conditioned.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Applicant, Financial Qualification
FCC Forms,
Financial Qualifications

Commission overturned Bureau policy which allowed applicants filing the 1977 version of Form 301 to certify their financial qualifications after being designated for hearing, if they had not demonstrated those qualifications under the old form. Hearing applicants which took advantage of this policy must now show their compliance with standards of old form or have financial issues specified against them.
–South Florida B/cing Co. Inc.
BC Docket No. 82–731

FCC 83–265

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
SOUTH FLORIDA BROADCASTING COMPANY INC. North Miami, Florida	BC Docket No. 82–731 File No. BPH-810427AJ
UNITY BROADCASTING NETWORK-FLORIDA INC Miami, Florida	BC Docket No. 82–732 File No. BPH-810427AL
RADIOCENTRO BROADCASTING COMPANY Miami, Florida	BC Docket No. 82–733 File No. BPH-810630AJ
FIRST BLACK BROADCASTERS OF MIAMI, INC. Miami, Florida	BC Docket No. 82–734 File No. BPH-810630AK
CONSTANCE J. WODLINGER Miramar, Florida	BC Docket No. 82–736 File No. BPH-810630AT
ONYX BROADCASTING OF MIAMI, INC Miami, Florida	BC Docket No. 82–737 File No. BPH-

	810701AC
RANA BROADCASTING COMPANY, INC. Liberty City, Florida	BC Docket No. 82–738 File No. BPH-810701AE
WILLIAM H. HERNSTADT North Miami Beach, Florida	BC Docket No. 82–741 File No. BPH-810701AK
SOUTHWEST RADIO ENTERPRISES, INC. North Miami Beach, Florida	BC Docket No. 82–742 File No. BPH-810701AN
For Construction Permit for a New FM Station	

MEMORANDUM OPINION AND ORDER

(Adopted: May 26, 1983 : Released: June 2, 1983)

BY THE COMMISSION: COMMISSIONER FOGARTY NOT PARTICIPATING; COMMISSIONER SHARP ABSENT.

1. In our *Revision of Form 301*,[1] we simplified FCC Form 301 for applicants seeking authority to construct and operate new broadcast stations. The new form became effective on December 2, 1981. Prior to that date, applicants for new broadcast stations utilized the 1977 version of the form. The old form required a broadcast applicant to give a detailed itemization of projected expenditures and sources of funds and to provide various documents demonstrating the availability of funds, so that the staff could determine whether the applicant was financially qualified. The new form contains two questions in Section III of the form which are to be answered by filling in "yes" or "no" blocks. Essentially, the form allows the applicant to certify as to whether it has available sufficient funds to construct and operate its proposed station. Thus, an applicant can now certify to its financial qualifications without filing supporting documentation, even though the form states that the applicant must be prepared to make such documentation available to the Commission upon request.

2. In *Minority Broadcasters of East St. Louis, Inc. et al. (East St. Louis)*,[2] the Chief, Broadcast Bureau, issued a Hearing Designation Order in which he noted that the financial certification process was adopted to expedite application processing and that, in the interest of fairness, all applicants should be held to the same standard. Thus,

[1] 50 RR 2d 381 (1981).

[2] Mimeo No. BC 5092, released July 15, 1982.

the Bureau concluded that applicants filing on the "old" form should be allowed to certify their financial qualifications within 30 days of being designated for hearing if they had not demonstrated their financial qualifications on the old form. The *East St. Louis* Order also provided that, if an applicant cannot certify to its financial qualifications within the stated 30-day period, the Administrative Law Judge must specify an appropriate financial issue against the applicant.

3. We now have before us: (a) an Application for Review of the Hearing Designation Order[3] in this proceeding filed November 12, 1982, by South Florida Broadcasting Company, Inc. (South Florida); and (b) oppositions to that Application for Review filed by Constance J. Wodlinger, Unity Broadcasting Network-Florida, Inc. and the Chief, Broadcast Bureau. Since we shall grant most of the basic relief sought by South Florida, we shall not recite all of its arguments or the counter arguments of its opponents. Basically, South Florida alleges that the Bureau, in following its *East St. Louis* policy, exceeded its delegated authority and improperly changed the Commission's financial qualifications standards for broadcast applicants. South Florida contends that several competing applicants in this proceeding who did not comply with the financial standards of the "old" form should not be permitted to amend their applications by certification and thereby avoid any effective examination of their financial qualifications.

4. Further, South Florida observes that the Commission's opinion in *Mid-Ohio Communications, Inc. (Mid-Ohio)*[4] is in direct conflict with the *East St. Louis* policy. In designating two competing applications for hearing in *Mid-Ohio*, the Commission noted that the original financial showing provided by Metro Broadcasting, Inc. (Metro) had failed to establish its financial qualifications. Although Metro amended its application prior to being placed in hearing to certify its financial qualifications, it did not submit any supporting documentation or specify any changes in its financial proposal. We determined that the certification did not obviate the need to specify a financial issue against Metro, stating:

> "Because the only information on file indicates that Metro is not financially qualified, and because it has not stated that its financial plan has been amended, we cannot credit its certification.[5]

5. The Broadcast Bureau and two of the applicants in this proceeding who were afforded the opportunity of certifying their financial qualifications after being designated for hearing pursuant to the *East St. Louis* policy oppose the foregoing Application for

[3] Mimeo BC 572, released November 3, 1982.

[4] 90 FCC 2d 114, 121, released June 1, 1982.

[5] *Id.*, at 121 n.9.

Review. They allege that the *East St. Louis* policy has not changed the requirement that broadcast applicants be financially qualified, does not amount to an improper revision of the Commission's financial qualifications standards, and does not favor one applicant over any other applicant because the policy's benefits are available to all applicants.

6. We have determined that the *East St. Louis* policy misapplies the certification procedure in a manner inconsistent with its intent. The *Report and Order* instituting the certification procedure makes it clear that the Commission's substantive financial standards have not been changed in that all applicants must be capable of constructing and operating their proposed stations for three months.[6] Thus, when an applicant submits insufficient information to demonstrate its financial qualifications, a substantive and material question of fact arises. The subsequent submission of a certification by the applicant is not sufficient to resolve the factual issue the applicant itself has raised by its prior submission of specific and inconsistent information. Under these circumstances, the certification underlines the question rather than erases it. *See* 47 U.S.C. § 309(e).

7. For these reasons, we grant review and overturn the *East St. Louis* policy. Further, we hereby require all broadcast applicants who are currently prosecuting their applications in hearing proceedings and who initially utilized the 1977 version of Form 301 but subsequently established their financial qualifications pursuant to the new certification procedure, to make the full documentary showing specified in the "old" form within 30 days of the release of this Memorandum Opinion and Order.[7] Although we realize that this requirement will affect not only those applicants who were allowed to certify to their financial qualifications after being designated for hearing pursuant to the *East St. Louis* policy, but also applicants who took advantage of the certification procedure prior to being designated for hearing, it would be unfair and inappropriate to treat these two categories of broadcast applicants in different ways.[8] If an applicant affected by this ruling fails to demonstrate its financial qualifications in accordance with the former requirements within 30 days,[9] the presiding officer shall specify an appropriate

[6] 50 RR 2d 381, 382 (1981).

[7] *See Mid-Ohio Communications, Inc. supra.*

[8] Although our decision in this case involves only applicantions filed on Form 301, the determination reached here would apply equally to hearing proceedings involving applications filed on any other form, *e.g.*, Form 340 for noncommercial educational broadcast stations, where a question concerning an applicant's financial qualifications has arisen under similar circumstances.

[9] We hereby grant presiding officers authority to grant extensions of the 30-day period, as appropriate, for good cause shown.

financial issue or issues against the applicant.[10]

8. ACCORDINGLY, IT IS ORDERED, That the Application for Review of the Hearing Designation Order[11] in this proceeding filed November 12, 1982, by South Florida Broadcasting Company, Inc. IS GRANTED to the extent indicated in this Memorandum Opinion and Order and IS DENIED in all other respects.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

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[10] Although South Florida requests immediate specification of such issues, we believe the better procedure is to allow a reasonable period for submission of necessary information, in light of the fact that many applicants have previously relied upon the *East St. Louis* policy in good faith.

[11] Mimeo BC 572, released November 3, 1982.

Satellite Domestic Communications
Satellite Launch Authority
Satellite Orbit

Application to construct and launch an additional space station in Domestic Fixed Satellite Service granted to meet licensees current traffic projections. Proposal consistent with Commission's policies and serves the public interest, convenience and necessity.
–*S. Pacific Communications Co.*

FCC 83–194

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of the Applications of SOUTHERN PACIFIC COMMUNICATIONS COMPANY For Authority to Construct, Launch and Operate Space Stations in the Domestic Fixed-Satellite Service and Sell Transponders on a Noncommon Carrier Basis	File Nos. 25-DSS-LA-82 26-DSS-P-82 996-DSS-MP/ML-(4)-82

ORDER AND AUTHORIZATION

(Adopted: April 27, 1983 Released: August 4, 1983)

BY THE COMMISSION: COMMISSIONER JONES ABSENT

1. The Commission is considering the above-captioned applications filed by Southern Pacific Communications Company (SPCC)[1] to launch its ground spare as a third in-orbit satellite and to construct a fourth satellite to be used as a ground spare. Public notice of these applications was given on November 21, 1982. A petition to deny the applications was filed by Western Union Telegraph Company (Western Union), and comments were filed by American Satellite Company (ASC), COMSAT General Corporation (COMSAT), RCA

[1] In 1982, SPCC created a separate subsidiary to hold its domestic satellite radio authorizations known as Southern Pacific Satellite Company (SPSC). Its pending applications were not, however, transferred to the new entity, but were retained by the original applicant, SPCC.

American Communications (RCA Americom) and Satellite Syndicated Systems (SSS).[2] For the reasons discussed below, we deny this petition and grant SPCC's applications.

2. In 1980 SPCC was authorized to construct three domestic communications satellites and to launch and operate two in the geostationary orbit.[3] The first two satellites of this system are scheduled to go into service in 1984. Each of these "Spacenet" satellites, including the current ground spare and the proposed fourth satellite, employs a "hybrid" design. The SPCC satellites contain 12 narrowband (36 MHz) transponders and 6 wideband (72 MHz) transponders operating in the 4/6 GHz bands, and 6 wideband (72 MHz) transponders operating in the 12/14 GHz bands. The satellites are capable of serving the 48 contiguous states with coupled spot beam coverage of Alaska and Hawaii at 4/6 GHz, with coverage of only 48 contiguous states at 12/14 GHz. The satellites have a 7 year minimum lifetime. The projected investment costs for the entire SPCC four satellite system is $302 million.[4]

3. SPCC expects construction to be completed by December 31, 1984 for Spacenet III and June 30, 1985 for Spacenet IV. Spacenet III is scheduled for launch during February 1985. It requests authority to sell ten transponders on a noncommon carrier basis on Spacenet III in accordance with its application for modification of license filed March 15, 1982 (File No. 996-DSS-MP/ML-(4)-82) and the amendment to that application filed July 23, 1982. SPCC requests an orbital position capable of serving all 50 states so that it can meet its increased internal service requirements for its Hawaiian customers.

4. Western Union and RCA Americom argue in their pleadings that SPCC has failed to demonstrate a sufficient need for an additional orbital location. In response, SPCC indicates that all of the transponders on Spacenet I, II and III have been committed for customer use. Therefore, it has ceased to actively pursue additional customers. Other issues raised with respect to these proposals and the processing of these applications are fully resolved in the *Report and Order* in CC Docket No. 81–704, FCC 83–184, and *1983 Orbit Assignment Order*, FCC 83–185, both adopted today, and we will not repeat that discussion here.[5]

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[2] We are also considering the applicant's previously deferred request to sell transponders on its third in-orbit satellite on a noncommon carrier basis. *See* Southern Pacific Satellite Company, FCC 82–512, released November 29, 1982. Petitions to deny applicant's request to sell these transponders in File No. 996-DSS-MP/ML-(4) -82 were filed by Wold Communications, Inc. and Satellite Syndicated System.

[3] Southern Pacific Communications Company, 84 FCC 2d 650 (1981).

[4] The applicant's financial qualifications to undertake this project are a matter of record before the Commission, and are not questioned by any party.

[5] We believe that this decision, along with our decision in Domestic Fixed Satellite Services, 90 FCC 2d 1 (1982), *recon. denied*, and the Memorandum Opinion and

5. In related actions taken today, we have reduced orbital spacings between domestic satellites in the 4/6 GHz and 12/14 GHz bands so that additional satellites might be accomodated in orbit to satisfy growing demands for domestic satellite services. As a result of these reduced spacing criteria, we are now able to accommodate all such applications in the current processing group under our open entry policies for licensing domestic satellites. Thus, we are able to grant them without the need to resort to a comparative hearing. As such, the only issue raised by these applications is whether SPCC has demonstrated sufficient need to warrant an additional orbit location.[6] SPCC claims that all of the transponders on the SPACENET I, II and III satellites are essentially committed. Moreover, SPCC projects by 1983 significant increases in internal requirements as well as increased outside demand. We believe that in light of SPCC's successful marketing efforts, a third orbit position is presently warranted to satisfy expected demand for SPCC transponders. Moreover, we reserve authority to require colocation of the company's satellites to reduce or eliminate excess spare capacity if these representations are not fulfilled. Also, in accordance with the criteria set forth in our *Report and Order*, FCC 83–184, adopted today, and in *Domestic Fixed Satellite Transponder Sales*, 90 FCC 2d 1238 (1982), we are providing SPCC with authority to sell up to ten transponders on the SPACENET III satellite on a noncommon carrier basis.[7]

6. Accordingly, IT IS ORDERED that Application File No. 25-DSS-LA-82 IS GRANTED and Southern Pacific Communications Company IS AUTHORIZED to launch and operate its previously authorized ground spare satellite in the domestic Fixed-Satellite Service in accordance with the *1983 Orbit Assignment Order*, FCC 83–186, adopted today.

7. IT IS FURTHER ORDERED that Application File No. 26-DSS-P-82 IS GRANTED and Southern Pacific Communications Company IS AUTHORIZED to construct a new domestic communications

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Order, FCC 83–183, adopted today, are fully dispositive of any arguments raised with respect to the processing of these applications. This also includes issues raised concerning the application of our *1980 Processing Order*, 77 FCC 2d 856 (1980), and any potential hearing rights that might be granted under the *Ashbacker Doctrine*. *See* Ashbacker Radio Corporation v. FCC, 326 FCC 2d 327 (1945). Moreover, our *1983 Orbit Assignment Order*, FCC 83–196, resolves all issues raised by the parties relating to particular orbit assignments.

[6] On October 26, 1982, GTE Corporation and Southern Pacific Company applied for Commission consent to the transfer of control of SPCC and SPSC to GTE. This order addresses only the question as to whether SPCC should be authorized to launch a third in-orbit satellite and to construct a fourth. Any issues raised by the GTE acquisition of SPCC and SPSC will be dealt with in the appropriate proceeding, and this action is without prejudice to any action we may take on those applications.

[7] As specified by SPCC in their application, this includes up to eight 72 MHz transponders.

satellite to be used as an on-ground spare in accordance with the terms, conditions and technical specifications set forth in its application and the formal instrument of authorization to be issued at a later date.

8. IT IS FURTHER ORDERED that Southern Pacific Satellite Company shall comply with all the requirements of the *Report and Order* in CC Docket No. 81–704, FCC 83–184, and *1983 Orbit Assignment Order*, FCC 83–186, as well as the terms and conditions of all other previous orders and authorizations.

9. IT IS FURTHER ORDERED that, unless extended by the Commission for good cause shown, each of these authorizations shall become null and void in the event the space station is not constructed, launched and successfully placed into operation in accordance with the technical parameters and terms and conditions of this authorization, and no later than the following dates specified in applications for these facilities:

	Construction Completed	*Launch no later than*
Spacenet III	December 3, 1984	March 1, 1985
Spacenet IV	June 30, 1985	(ground spare)

10. IT IS FURTHER ORDERED that Southern Pacific Satellite Company IS AUTHORIZED to sell up to ten (10) transponders on the SPACENET III satellite as proposed in its application and in accordance with the policies articulated in *Domestic Fixed Satellite Transponder Sales*, 90 FCC 2d 1238 (1982).

11. IT IS FURTHER ORDERED that the temporary assignment of any orbital location to Southern Pacific Communications Company is subject to change by summary order of the Commission on 30 days notice and does not confer any permanent right to the use of the orbital spectrum. Such a change may be ordered *inter alia* to implement uniform 2 ° separations, to require colocation of in-orbit satellites in the event of excess spare capacity, or to implement any of the objectives or policies set forth in today's *Report and Order*, FCC 83–184, in CC Docket No. 81–704, or *1983 Orbit Assignment Order*, FCC 83–186. Neither this authorization, nor any right granted by this authorization, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, or by transfer of control of any corporation holding this authorization, to any person except upon application to the Commission and upon a finding by the Commission that the public interest, convenience, and necessity will be served thereby.

12. IT IS FURTHER ORDERED that the Petitions to Deny filed by Western Union Telegraph Company, Wold Communications, Inc. and Satellite Syndicated Systems ARE DENIED.

13. Southern Pacific Communications Company is afforded thirty days from the date of release of our *Report and Order*, *supra*, to

decline these authorizations as conditioned. Failure to respond within that period will constitute formal acceptance of the authorizations as conditioned.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Financial Qualifications
Satellite Domestic Communications
Satellite Launch Authority
Satellite Orbit

Applications to construct and launch space stations in Domestic Fixed Satellite Service granted conditioned on demonstration of firm financial qualifications. Proposal consistent with Commission's policies and serves the public interest, convenience and necessity.
–U.S. Satellite Systems, Inc.

FCC 83–195

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of the Applications of UNITED STATES SATELLITE SYSTEMS, INC. For Authority to Construct, Launch and Operate Space Stations in the Domestic Fixed-Satellite Service	File Nos. 448-DSS-P/LA-82 449-DSS-P/LA-82 450-DSS-P-82

ORDER AND AUTHORIZATION

(Adopted: April 27, 1983 Released: August 4, 1983)

BY THE COMMISSION: COMMISSIONER JONES ABSENT

1. The Commission is considering the above-captioned applications filed by United States Satellite Systems, Inc. (USSSI) to construct and operate a new domestic satellite system. USSSI proposes to construct three satellites. Two would be launched and operated in orbit and the third reserved as an on-ground spare. Public notice of these applications was given on December 16, 1981. A Petition to Deny the applications was filed by American Satellite Company (ASC) and comments were filed by Satellite Business Systems (SBS). For the reasons discussed below, we deny the petition and grant USSSI's applications.

2. USSSI is a newly formed corporation created for the purpose of constructing, launching and operating the above-captioned satellite system. It proposes to operate this satellite system (the USAT system) in the 12/14 GHz frequency bands. Each satellite will be equipped with twenty transponders, each with a usable bandwidth of

43 MHz. Ten of the USAT transponders on each spacecraft are designed for complete coverage of the 48 contiguous states, Alaska and Hawaii. USSSI proposes to launch its first satellite in October 1985. The other ten transponders are designed to provide regional and spot beam coverage reaching all of the contiguous 48 states, Alaska and Hawaii. The satellites will be designed for a planned orbit life of eight years.

3. USSSI intends to serve a diverse group of users including such major traffic categories as data communications services, telephony transmission, video conferencing and program distribution services. The company plans to offer service on a common carrier basis but reserves the possibility of engaging in transponder sales.[1] USSSI estimates the cost of its system to be $222 million, with first year operating costs of $8.1 million for the space segment. It has received a $20 million line of credit, and has entered into an agreement with Wang Laboratories to acquire up to 10 percent of USSSI's stock.[2]

4. The comments regarding the USSSI applications generally center on whether USSSI is financially and technically qualified to own and operate a domestic satellite system. ASC and SBS both assert that USSSI has failed to meet the burden imposed by the Commission regarding financial qualifications. More persuasive financial information, as well as operating and marketing plans according to ASC, needs to be submitted before scarce orbit locations are assigned to USSSI. USSSI responds that there is no statutory requirement for a particular measure of financial strength. Marketplace forces, rather than governmental judgments, should be the primary test of capital investment. Thus, USSSI believes that the Commission should grant it a construction permit and simply make it contingent upon commencing construction by a certain date. According to USSSI, personnel possessing the necessary technical and marketing skills are readily available and will be hired at the appropriate time. Other issues raised with respect to this proposal and the processing of these applications are fully resolved in the *Report and Order* in CC Docket No. 81–704, FCC 83–184, and *1983 Orbit Assignment Order*, FCC 83–186, both adopted today, and we will not repeat that discussion here.[3]

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[1] USSSI states that it has entered into agreements with NCR Telecommunications Services, Inc. and Wang Laboratories concerning their rights to purchase transponders at a future time. However, USSSI has not yet submitted the information specified in Domestic Fixed Satellite Transponder Sales, 90 FCC 2d 1238 (1982). Therefore, USSSI must be prepared to offer its services on a common carrier basis until such time that it receives authorization to operate on a noncommon carrier basis.

[2] *See* Supplemental Information submitted by letters dated October 26, 1982 and April 20, 1983. Wang and USSSI have also entered into a technical cooperation agreement between the two companies. *See* letter from USSSI to the Commission dated November 24, 1982.

5. In related actions taken today, we have reduced orbital spacings between domestic satellites in the 4/6 GHz and 12/14 GHz bands so that additional satellites might be accommodated in orbit to satisfy growing demands for domestic satellite services. *See Report and Order, supra.* We are taking these actions to continue the opportunities for initial entry by new companies such as USSSI into the domestic satellite market, as well as to provide for the expansion of existing systems already in place. Under these new criteria, we are able to grant all applications in the current processing group under our open entry domestic satellite licensing policies. Thus, we are able to grant it without the need to resort to a comparative hearing. However, despite the progress made by USSSI in establishing the financial base for its proposed system, we must also recognize that USSSI has not yet been able to adequately demonstrate full financial qualifications to construct and operate its proposed system. We have also addressed this issue in today's *Report and Order, supra,* and have decided that conditioned grants, rather than denial or evidentiary hearings, will better serve the public interest in the prompt and efficient supply of domestic satellite services in the future. Consequently, we will issue construction and launch authorizations to USSSI conditioned on their demonstrating their full financial qualifications, as set forth in our *Report and Order, supra,* no later than December 31, 1983. In the event that USSSI has not fulfilled this requirement by that date, the authorizations will automatically become null and void.

6. Accordingly, IT IS ORDERED that Application File Nos. 448-DSS-P/LA-82, 449-DSS-P/LA-82 and 450-DSS-P-82 ARE GRANTED and United States Satellite Systems, Inc. IS AUTHORIZED to construct three domestic communications satellites in accordance with the terms, conditions and technical specifications set forth in its applications and the formal instruments of authorization to be issued at a later date.

7. IT IS FURTHER ORDERED that United States Satellite Systems, Inc. IS AUTHORIZED to launch and operate two space stations in the domestic Fixed Satellite Service in accordance with the *1983 Orbit Assignment Order*, FCC 83–186, adopted today.

8. IT IS FURTHER ORDERED that these authorizations shall become null and void in the event United States Satellite Systems, Inc. fails to demonstrate its financial qualifications by December 31,

[3] We believe that this decision, along with our decision in Domestic Fixed Satellite Services, 90 FCC 2d 1 (1982), *recon. denied,* and the Memorandum Opinion and Order, FCC 83–183, adopted today, are fully dispositive of any arguments raised with respect to the processing of these applications. This also includes issues raised concerning the application of our *1980 Processing Order*, 77 FCC 2d 856 (1980), and any potential hearing rights that might be granted under the *Ashbacker Doctrine. See* Ashbacker Radio Corporation v. FCC, 326 FCC 2d 327 (1945). Moreover, our *1983 Orbit Assignment Order*, FCC 83–196, resolves all issues raised by the parties relating to particular orbit assignments.

1983 in accordance with the policies and criteria specified in the *Report and Order*, FCC 83–184, adopted today in CC Docket No. 81–704.

9. IT IS FURTHER ORDERED that United States Satellite Systems, Inc. shall comply with all the requirements of the *Report and Order* in CC Docket No. 81–704, FCC 83–184, and *Memorandum Opinion and Order*, FCC 83–186, both adopted today.

10. IT IS FURTHER ORDERED that, unless extended by the Commission for good cause shown, each of these authorizations shall become null and void in the event the space station is not constructed, launched and successfully placed into operation in accordance with the technical parameters and terms and conditions of this authorization, and no later than the following dates specified in the applications for these facilities:[4]

	Construction Commenced	*Construction Completed*	*Launch (no later than)*
USAT I	July 15, 1983	November 15, 1983	February 15, 1984
USAT II	January 15, 1984	May 15, 1986	August 15, 1986
USAT III	July 15, 1984	November 15, 1986	(ground spare)

11. IT IS FURTHER ORDERED that the temporary assignment of any orbital location to United States Satellite Systems, Inc. is subject to change by summary order of the Commission on 30 days notice and does not confer any permanent right to the use of the orbital spectrum. Such a change may be ordered *inter alia* to implement uniform 2 ° separations, to require colocation of in-orbit satellites in the event of excess spare capacity, or to implement any of the objectives or policies set forth in today's *Report and Order*, FCC 83–184, in CC Docket No. 81–704, or *1983 Orbit Assignment Order*, FCC 83–186. Neither this authorization, nor any right granted by this authorization, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, or by transfer of control of any corporation holding this authorization, to any person except upon application to the Commission and upon a finding by the Commission that the public interest, convenience, and necessity will be served thereby.

12. IT IS FURTHER ORDERED that the Petition to Deny filed by American Satellite Company IS DENIED.

13. United States Satellite Systems, Inc is afforded thirty days from the date of release of our *Report and Order*, *supra*, to decline these authorizations as conditioned. Failure to respond within that period will constitute formal acceptance of the authorizations as conditioned.

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[4] USSSI provides construction and launch dates only for USAT I. We have assumed a six month lag in the commencement of construction of the subsequent satellites and use the projected 28 month construction schedule to obtain the necessary milestones for the other USSSI satellites.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Satellite Domestic Communications
Satellite Launch Authority
Satellite Orbit

Applications to construct and launch space stations in Domestic Fixed Satellite Service is granted to meet licensees current traffic projections. Proposal is consistent with Commission's policies and serves the public interest, convenience and necessity. Previous assignments for Advanced Westar satellites in 86 FCC 2d 196 (1981) are null and void.
–*Western Union Telegraph Co.*

FCC 83–196

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of the Application of WESTERN UNION TELEGRAPH COMPANY For Authority to Launch and Operate a Space Station in the Domestic Fixed-Satellite Service and Sell Transponders on a Noncommon Carrier Basis	File No. 723-DSS-P/LA-81

ORDER AND AUTHORIZATION

(Adopted: April 27, 1983 Released: August 4, 1983)

BY THE COMMISSION: COMMISSIONER JONES ABSENT

1. The Commission is considering the above-captioned application submitted by Western Union Telegraph Company (Western Union) to launch and position the Westar VI domestic communications satellite. Public notice of this application was given on March 4, 1981. Petitions to deny were filed by Southern Pacific Communications Company and Hughes Communications, Inc. Additionally, comments were filed by RCA American Communications, Inc., American Satellite Company, Continental Telephone Corporation/Fairchild Industries, Inc and Satellite Business Systems. On January 26, 1983, public notice was given of Western Union's amendment to this application proposing to sell ten Westar VI transponders on a noncommon carrier basis. This proposal was opposed by Wold Communications, Inc. in its petition to deny and by Satellite Syndicated Systems, Inc. For the reasons discussed below, we deny the petitions and grant Western Union's application, as amended.

2. Western Union currently operates a domestic satellite system known as "Westar" in the 4/6 GHz frequency bands presently consisting of four satellites. (Westar II, Westar III, Westar IV and Westar V).[1] The Westar II and III satellites contain 12 transponders of 36 MHz and the other two, as well as the proposed Westar VI, contain 24 transponders. Westar VI will be capable of serving Alaska, Hawaii, and Puerto Rico/Virgin Islands, and will have a ten year operating lifetime. Total investment for Westar VI is estimated at $83.252 million.[2]

3. In 1978 Space Communications Company (Spacecom) applied to construct, launch and operate the Advanced Westar satellites.[3] These satellites were to be a part of a dual purpose system. The Tracking, Data and Relay Satellite System (TDRSS) was to be operated by NASA in government frequency bands to replace the current NASA ground satellite network. The Advanced Westar system was to be operated by Spacecom and leased in its entirety to Western Union and American Satellite Company for the provision of their common carrier services. One of the Advanced Westar satellites was to be shared by both TDRSS and Advanced Westar functions, and the other to be used exclusively for commercial domestic satellite services. The Advanced Westar capacity was initially intended to replace the commercial Westar I and II satellites in 1982. When it became apparent that the Advanced Westar satellites would not be available by that time, Western Union procured Westar IV and V as replacements for Westar I and II. *Id.* These satellites were also to provide system expansion since they contained 24 instead of 12 transponders. In *Domestic Fixed-Satellite Service - Orbit Deployment Plan*, 84 FCC 2d 584 (1981), we assigned Western Union two orbit positions at 4/6 GHz for operation of the Westar system and two hybrid positions in both the 4/6 GHz and 12/14 GHz bands to Western Union and Spacecom for operation of the Advanced Westar system.[4] By letter dated January 17, 1983, Western Union informed the Commission that the TDRSS/Advanced Westar program had been restructured so as to remove the commercial aspects of the program, with NASA to have full and exclusive use of the capacity of the satellites. Western Union also stated that it will withdraw from participation in Spacecom.

4. In February 1981, Western Union submitted the application

[1] *See* Western Union Telegraph Company, 38 FCC 2d 1197 (1973), FCC 79–444 released July 24, 1979 and 86 FCC 2d 196 (1981). Its first satellite, Westar I, was recently retired from service. *See* letter to Commission dated April 8, 1983.

[2] Western Union's financial qualifications are a matter of record before the Commission, and are not at issue in this proceeding.

[3] Spacecom was established as a partnership owned by subsidiaries of Western Union (50%), Fairchild Industries, Inc. (25%), and Continental Telephone Corporation (25%). *See* Western Union Telegraph Company, 86 FCC 2d 196 (1981).

[4] We permitted the applicants to allocate the four satellites among the four positions in any way they deemed desirable.

for the Westar VI satellite. This satellite was to serve as a replacement satellite in case of failure of any of the Westar satellites and as a means to accommodate traffic growth. Construction authority was provided in October 1981 so that the satellite could serve as a ground spare.[5] Action was deferred at that time on Western Union's request for the launch and assignment of an orbital location for Wester VI.

5. The principle question before us at this time is whether or not the orbital assignments intended for the Advanced Westar satellites are still available for new Western Union satellites now that it has announced that it not longer intends to participate in the TDRSS/Advanced Westar system. Other issues raised with respect to these proposals and the processing of these applications are fully resolved in the *Report and Order* in CC Docket No. 81–704, FCC 83–184, and *1983 Orbit Assignment Order*, FCC 83–185, both adopted today, and we will not repeat that discussion here.[6]

6. The orbital assignments made in 1980 did not confer upon Western Union or Spacecom any permanent rights. Moreover, the authorizations were to become null and void in the event the space stations were not constructed and launched and successfully placed into operation.[7] Since Western Union and Spacecom have abandoned their intention to construct, launch and operate the Advanced Westar satellites for commercial domestic satellite services, the hybrid orbit assignments for those satellites are now null and void. Moreover, the only Western Union application presently ready for processing and eligible for assignment of an orbital position is that of Westar VI.[8]

7. In light of the reduced orbital spacing criteria adopted in our *Report and Order, supra*, we are able to accomodate all applications in the current processing group under our open entry domestic

[5] Western Union Telegraph Company, FCC 81–465, released October 6, 1981.

[6] We believe that this decision, along with out decision in Domestic Fixed Satellite Services, 90 FCC 2d 1 (1982), *recon. denied*, and the Memorandum Opinion and Order, FCC 83–183, adopted today, are fully dispositive of any arguments raised with respect to the processing of these applications. This also includes issues raised concerning the application of our *1980 Processing Order*, 77 FCC 2d 856 (1980), and any potential hearing rights that might be granted under the *Ashbacker Doctrine*. *See* Ashbacker Radio Corporation v. FCC, 326 FCC 2d 327 (1945). Moreover, our *1983 Orbit Assignment Order*, FCC 83–196, resolves all issues raised by the parties relating to particular orbit assignments.

[7] Western Union Telgraph Company, 86 FCC 2d 196, 219 (1981). *Cf.* RCA American Communications, Inc., 84 FCC 2d 633 (1981). After SATCOM III was lost, RCA was required to apply for a new orbit position for SATCOM III-R.

[8] Subsequent to *Domestic Fixed Satellite Service, supra* note 6, Western Union filed applications for construction and operation of the Westar VII and VIII satellites at 4/6 GHz, as well as a three in-orbit 12/14 GHz band system. These satellites were principally designed to meet projected growth in traffic demands for Westar transponders, as well as replacements for Advanced Westar capacity. However, since they were all filed after May 18, 1982, they are not being considered in the current processing group.

satellite licensing policies and do not have to resort to a comparative hearing. Moreover, we believe that Western Union has made an adequate demonstration of need for this satellite in light of its projected shortage of 14.4 transponders in the third quarter of 1983 prior to the prospective availability of Westar VI. In addition, at this time we see no reason to require Western Union to operate with less than four orbit locations. The Westar III satellite is currently operating at 91° and has at least three years left in its operational lifetime. We do continue to have serious questions about having a 12 transponder satellite occupying an orbit position. However, we do not believe it would serve the public interest if we require Western Union to colocate or turn the satellite off, since it is currently operating near capacity serving a wide variety of customers.[9] In the event Western Union's traffic projections do not materialize, we reserve the authority to require colocation of Westar satellites to reduce or eliminate excess spare capacity.

8. We also find that the sale of up to ten Westar VI transponders is consistent with the policy and legal analysis contained in *Domestic Fixed Satellite Transponder Sales*, 90 FCC 2d 1238 (1982). *See also Report and Order* in CC Docket No 81–704, FCC 83–184 adopted today.

9. Accordingly, IT IS ORDERED that Application File No. 723-DSS-P/LA-81 IS GRANTED, and Western Union Telegraph Company IS AUTHORIZED to launch and operate the Westar VI satellite in the domestic Fixed Satellite Service in accordance with the *1983 Orbit Assignment Order*, FCC 83–186, adopted today.

10. IT IS FURTHER ORDERED that Western Union shall comply with all of the requirements of the *Report and Order* in CC Docket No. 81–704, FCC 83–184, and our *1983 Orbit Assignment Order*, FCC 83–186, both adopted today, as well as the terms and conditions of all previous orders and authorizations.

11. IT IS FURTHER ORDERED that, unless extended by the Commission for good cause shown, this authorization to launch and operate Westar VI in orbit shall become null and void in the event the space station is not launched and successfully placed into operation by December 31, 1983 in accordance with the technical parameters and terms and conditions of the radio station authorization for this satellite.

12. IT IS FURTHER ORDERED that Western Union Telegraph Company IS GRANTED authority to sell up to 10 transponders on the Westar VI satellite as proposed in its application and in accordance with the policies articulated in *Domestic Fixed Satellite Transponder Sales*, 90 FCC 2d 1238 (1982).

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[9] The Westar II satellite is expected by Western Union to reach the end of its operational lifetime by the end of 1983. Therefore, we see no reason to retain an orbit assignment for its operation beyond that date.

13. IT IS FURTHER ORDERED that the temporary assignment of any orbital location to Western Union Telegraph Company is subject to change by summary order of the Commission on 30 days notice and does not confer any permanent right to the use of the orbitor spectrum. Such a change may be ordered *inter alia* to implement uniform 2° separations, to require colocation of in-orbit satellites in the event of excess spare capacity, or to implement any of the objectives or policies set forth in today's *Report and Order*, FCC 83–184, in CC Docket No. 81–704, or *1983 Orbit Assignment Order*, FCC 83–186. Neither this authorization, nor any right granted by this authorization, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, or by transfer of control of any corporation holding this authorization, to any person except upon application to the Commission and upon a finding by the Commission that the public interest, convenience, and necessity will be served thereby.

14. IT IS FURTHER ORDERED that the Petitions to Deny filed by Southern Pacific Communications, Hughes Communications, Inc. and Wold Communications, Inc. ARE DENIED.

15. Western Union Telegraph Company is afforded thirty days from the date of release of our *Report and Order*, *supra*, to decline this authorization as conditioned. Failure to respond within that period will constitute formal acceptance of the authorization as conditioned.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Common Carrier, Authorization
Common Carrier, Interconnection, Carrier to Carrier
Competition, Common Carriers
Telex

Memorandum Opinion, Order and Certificate adopted authorizing the Western Union Telegraph Company facilities to provide Teletex service within the United States and between the United States and Germany.
–*Western Union Telegraph Co.*

FCC 83–253

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of THE WESTERN UNION TELEGRAPH COMPANY Application for authority pursuant to Section 214 of the Communications Act to establish, acquire, and operate facilities for the provision of communications services between the below-named cities and the Federal Republic of Germany and beyond; and between Atlanta, Baltimore, Boston Charlotte, Chicago, Cincinnati, Cleveland, Dallas, Denver, Detroit, Houston, Indianapolis, Los Angeles, Miami, New Orleans, New York City, Philadelphia, Phoenix, Pittsburgh, Portland, St. Louis, San Francisco, Seattle, Tulsa, and Washington, D.C.	File No. I-T-C-82–258

MEMORANDUM OPINION, ORDER AND CERTIFICATE

(Adopted May 26, 1983 Released June 7, 1983)

BY THE COMMISSION: COMMISSIONER FOGARTY NOT PARTICIPATING; COMMISSIONER SHARP ABSENT.

I. *Introduction*

1. The Western Union Telegraph Company (Western Union) has filed for authority, pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214, to establish, acquire, and operate facilities: (a) for the provision of international Teletex

service between 25 cities in the United States and the Federal Republic of Germany (Germany);[1] and (b) for the provision of domestic Teletex service among the 25 U.S. cities.[2] Western Union has secured an operating agreement with Germany to provide the proposed service to that country.

2. Western Union International, Inc. (WUI) filed comments and requested imposition of certain conditions on Western Union's authorization. Western Union responded to WUI's comments and WUI replied to that response.[3]

II. *The Application*

3. Western Union requests authority to introduce "Teletex" service to the United States public. Teletex is a high speed data service with error correction capabilities. The transmission speed for Teletex is approximately 2400 bits per second (bps). This is almost 50 times faster than the standard Telex transmission speed of only 50 bps. Western Union states that its present facilities are not adequate for the proposed new service. Therefore, in order to provide domestic and international Teletex service, Western Union intends to secure facilities from other carriers and use them in combination with newly established facilities from its own Westar satellite and terrestrial microwave systems.[4] Under Western Union's proposal, the terminals of U.S. Teletex subscribers will be connected by access lines conditioned for data transmission at 3 kilobits per second (kbps) to a local concentrator. From there, high speed trunk lines conditioned for 9.6 kbps transmission will carry the information to a computer located at Western Union's New York operating center. At that point information will be switched to a line that will carry the message to the addressee terminal in the United States or to a line that will connect with an overseas circuit. The outbound international Teletex communications will be routed from the New York switch to an international earth station at Etam, West Virginia, for transmission via a 56 kbps satellite channel to Germany.[5] Inbound international Teletex will follow the reverse route.

4. Western Union also intends to provide subscribers with a

[1] The U.S. cities are Atlanta, Baltimore, Boston, Charlotte, Chicago, Cincinnati, Cleveland, Dallas, Denver, Detroit, Houston, Indianapolis, Los Angeles, Miami, New Orleans, New York, Philadelphia, Phoenix, Pittsburgh, Portland, St. Louis, San Francisco, Seattle, Tulsa, and Washington, D.C.

[2] Western Union also applied for temporary operating authority to provide service. In light of our action today that request is now moot.

[3] RCA Global Communications, Inc. (RCA) and International Relay, Inc., (International Relay) submitted letters in support of WUI.

[4] See paragraph 24 herein for a list of the facilities that Western Union will use.

[5] Western Union will route international Teletex transmissions from its New York City operating center to the international earth station at Etam, West Virginia. These transmissions will then be routed through an appropriate INTELSAT satellite located over the Atlantic Ocean and will connect with matching circuits

conversion feature that will permit communications between Teletex and Telex subscribers. There will be a switch located at Western Union's New York operating center with the capability of making code, speed and format conversion so that U.S. Teletex subscribers will be able to transmit information to Telex users in the United States and overseas.[6] Messages sent to Telex users that are originated by U.S. Teletex subscribers will be converted to the Telex network in New York and transmitted from there over existing facilities as Telex messages at the Telex speed of transmission. Western Union expects that the German communications carrier will accept Teletex messages from German entities for transmission to U.S. Telex subscribers.[7]

5. In implementing the proposed service Western Union claims it will invest over 38 million dollars within 3 years of operation. By the end of the third year it anticipates net operating revenue of over 11 million dollars.

6. Western Union asserts that approval of its application will serve the public interest by introducing high quality, competitive Teletex service to the U.S. public. It concludes that the introduction of this high speed data service for domestic and international communications will provide business and government with a useful alternative to existing services.

III. *Comments of WUI*

7. WUI, the only party to file formal comments in this proceeding, does not oppose the grant of authority sought by Western Union. However, it seeks to have certain conditions imposed on Western Union's authorization.

8. WUI argues that Western Union's proposed Teletex service, which gives Teletex subscribers the ability to transmit intelligence to Telex users, is subject to the Record Carrier Competition Act of 1981 (RCCA). Therefore, WUI asserts that the Commission must require Western Union to make its Teletex service available both domestically and internationally on an interconnected basis pursuant to the interconnection requirements of the RCCA and the Commission's Orders implementing that Act issued in Docket No. 82–122.[8]

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provided by Western Union's correspondent in the Federal Republic of Germany. Western Union will route the service via an international earth station at Andover Maine if facilities via Etam are not available.

[6] We note that Western Union does not specifically request authorization to provide Telex to Teletex transmission.

[7] Western Union does not specify if conversion switching for incoming Teletex to Telex messages will be done in Germany or in New York. However, CCITT recommendations assume that the conversion facility will be located in the same country as the Teletex machine. CCITT recommendations F. 200. Therefore, we expect that for inbound Teletex to Telex traffic the conversion will take place in Germany.

9. Furthermore, WUI requests that the Commission reaffirm its long standing policy against exclusive arrangements between a carrier and a foreign correspondent. It asserts that the Commission should condition Western Union's application so as to preclude the provision of this new service under an exclusive arrangement. WUI contends that both of the requested conditions are necessary to ensure a competitive international and domestic marketplace.

IV. *Other Pleadings*

10. In response to WUI, Western Union asserts that Teletex is not a "record communications service" within the meaning of Section 222 (a)(3) of the RCCA because it is not a service "traditionally offered by telegraph companies . . . involving an interconnected network of teletypewriters." Western Union argues that Teletex is a new high speed, data oriented service between sophisticated computer/word processing terminals, not teletypewriters. Therefore, it asserts that Teletex is not subject to the interconnection requirements of the RCCA. Rather, it maintains that for purposes of interconnection, Teletex should be treated under the standards and procedures of Section 201(a) of the Communications Act.

11. With respect to WUI's request for a non-exclusivity condition, Western Union argues that WUI has not made any showing that such a condition is required. Western Union maintains that its agreement is not exclusive and that Germany is free to enter into Teletex operating agreements with other U.S. carriers. Western Union asserts that if the Commission finds that a non-exclusivity condition is in the public interest then it should impose such a condition on all certificates.

12. In reply to Western Union's argument that Teletex is not a record communications service within the meaning of the RCCA, WUI points out that in the telecommunications industry, Teletex is frequently described as "super Telex," a description that highlights the similarities of the two services. It avers that the proposed Teletex service is nothing more that an interconnected network of sophisticated teletypewriters which, significantly, have interoperability with Telex machines. It argues that there is no basis for excluding Teletex from the RCCA's interconnection obligations.

13. WUI states that it did not mean to suggest that Western Union's agreement with Germany was an exclusive agreement.

[8] The RCCA requires interconnection for all "record communications services" and gives the Commission the power to prescribe the terms of such interconnection if necessary. In accordance with its statutory mandate the Commission prescribed interconnection provisions for two such services, "Telex" and "TWX." Interconnection Arrangements, CC Docket No. 82–122, Interim Order, 89 FCC 2d 928 (1982), *review pending*, Western Union v. FCC, D.C. Circuit No. 82–1502, filed May 4, 1982, Order rejecting and prescribing tariffs (Rejection Order) 91 FCC 2d 483 (1982), *reconsideration*, FCC 83–84, adopted March 3, 1983, *review pending* TRT v. FCC, (D.C. Circuit Nos. 82–1658, 82–1698, 82–1699).

However, it reiterates its position that in order to promote competition, this first application to provide Teletex should be conditioned with a non-exclusivity provision. It states that it does not object to such a condition being placed on all future authorizations, including its own.

V. *Discussion*

14. Upon consideration of the filings in this proceeding we conclude that the public convenience and necessity require grant of Western Union's Section 214 application to provide end-to-end Teletex service (Teletex) within the United States and between the United States and Germany. We find that the public interest will be served by the introduction of this high speed data technology into the U.S. market. At 50 times the transmission rate of Telex, Teletex service will provide a sophisticated alternative to existing services and will better satisfy user needs. Teletex may compete with other services, including Telex and dataphone, and could result in lower rates in substitutable services. Grant of the instant application will foster a more competitive marketplace environment which is conducive to increasing consumer choice and promoting the development of new and innovative services.[9]

15. Below we consider the applicability of the RCCA to Teletex service, WUI's request that we condition any grant of Western Union's application with a "non-exclusivity" clause and particular issues raised by the "conversion" capability of the proposed service offering.

A. *RCCA Issues*

16. In considering the applicability of the RCCA to Teletex

[9] *See* The Western Union Telegraph Co., FCC 82–378, released August 12, 1982 (authorization of Western Union's entry into the international record services marketplace); The Western Union Telegraph Co., File Nos. I-T-C-82–228, I-T-C-82–233, I-T-C-82–278, released December 30, 1982 (authorization allowing Western Union to provide record service between the United States and a total of 42 overseas points); *Also see* MTS and WATS Market Structure, 81 FCC 2d 177, 200 (1980), (Commission determination that the public interest is served by competition in the provision of message telephone service (MTS), wide area telephone service (WATS) and their functional equivalents); Specialized Common Carrier Services, 29 FCC 2d 870, *on reconsideration*, 35 FCC 2d 1106 (1971), *affirmed sub nom.*, Washington Utilities and Transportation Comm. v. FCC, 512 F.2d 1142 (2d Cir.) *cert. denied*, 423 U.S. 836 (1975) (FCC policies promoting domestic common carrier competition); Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities, 47 FCC 2d 644, (1974), 48 FCC 2d 1077 (1974), 60 FCC 2d 261 (1976), *modified*, 61 FCC 2d 70, *further modification*, 62 FCC 2d 588 (1977), *affirmed sub nom.* American Telephone and Telegraph Co. v. FCC, 572 F.2d 17 (2d Cir.), *cert. denied*, 439 U.S. 878 (1978); International Relay, Inc., 77 FCC 2d 819 (1980) (authorization of new store and forward telex service), *on reconsideration* 82 FCC 2d 41 (1980).

service, we must determine whether Teletex is subject to the same RCCA interconnection requirements as is Telex.[10] In order for the interconnection provisions of the RCCA to apply, the facilities employed must be used primarily to provide a "record communications service."

Section 222(c)(1)(A)(i) of the RCCA provides:

> . . . the Commission shall require each record carrier to make available to any other record carrier upon reasonable request, full interconnection with any facility operated by such record carrier, and used primarily to provide record communications service.

17. The RCCA defines record communications services as "those services traditionally offered by telegraph companies, such as telegraph, telegram, telegram exchange and similar services involving an interconnected network of teletypewriters."[11] The plain meaning of this language as well as the legislative history surrounding the enactment of the RCCA make clear that Teletex is not a "record communications service." Teletex is a new service distinct from traditional Telex service. Teletex employs a transmission speed 50 times the rate of Telex and has error correction capabilities not available in Telex. An examination of the legislative history of the RCCA reveals that the Act was never intended to apply to an end-to-end high speed service such as Teletex for interconnection or for any other purpose.[12] The Committee Report addressing the RCCA specifically states that high speed data services are outside the scope of the legislation.[13] In addition, Teletex service is designed to accommodate interconnection of terminal equipment that is significantly different than traditional teletypewriters. Subscribers to Teletex will utilize terminals which employ computer processing capabilities for data manipulation. Accordingly, we conclude that Teletex is not a "record communications service" within the meaning of the RCCA.

18. Moreover, the rationale underlying the interconnection requirements of the RCCA does not apply to Teletex. Prior to passage of the RCCA, Western Union had a monopoly in the domestic record market but was statutorily prohibited from engaging in international operations in competition with the international record carriers. In order to permit full and vigorous competition in both the international and domestic record communications markets, Congress passed the RCCA, which permits all carriers to compete

[10] See n. 8.

[11] 47 U.S.C. § 222(a)(3).

[12] Energy and Commerce Committee Report of the House of Representatives, Report No. 97–356, 97th Cong. 1st Sess. (Dec. 3, 1981) (Hereinafter, referred to as Committee Report). Store-and-forward and TWX/Telex Conversion, CC Docket No. 82–122, FCC 83–85, at para. 52, released March 14, 1983.

[13] See Committee Report at p. 10.

both domestically and internationally. In order to ensure that Western Union would not have an unfair advantage by virtue of its prior monopoly position, Congress required universal access to traditionally offered teletypewriter networks. A major reason behind this interconnection requirement was that unless a competing carrier could provide access to Western Union's existing Telex subscribers, it would be nearly impossible to sign up "the first" subscriber on its own network.[14] Because Western Union does not have an existing Teletex base, the protection which the RCCA sought to give to competing carriers for Telex is not needed for Teletex. For the foregoing reasons we conclude that Teletex is not subject to the interconnection provisions of the RCCA. However, we note that as a common carrier Western Union may have certain interconnection obligations imposed on it pursuant to Section 201(a) of the Communications Act.[15]

B. *Non-Exclusive Service to Germany*

19. WUI requests that the Commission condition any grant to Western Union for service to Germany with a "non-exclusivity" clause. We have long had a policy against carriers entering into exclusive arrangements with foreign entities.[16] In the current matter there is nothing in the record to indicate that Western Union and its German correspondent intend to enter into an exclusive agreement for Teletex service. Nevertheless, consistent with our longstanding policy against exclusive arrangements with foreign entities, we are expressly conditioning Western Union's grant with a "non-exclusivity" provision to assure that this policy is implemented. Any grants of similar authority to other carriers will be made subject to the same provisions.

C. *Conversion Features*

20. As indicated in its application, Western Union intends to offer subscribers a conversion feature that will involve the changing of code and format at Western Union's New York operating center. These code and format changes will allow terminals operating

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[14] Committee Report at p. 4–5. It was the intent of Congress however, that once a competitive marketplace in record services developed, carriers should be subject to a minimum level of regulation, because marketplace forces would protect the public. Accordingly, the strict interconnection requirements of the RCCA are scheduled to expire after a three year period from the date of enactment. Committee Report at p. 5–6, 47 U.S.C. Section 222(e)(1).

[15] A hearing is required under § 201(a) to determine if interconnection is warranted and to determine the terms and conditions for interconnection. The specific regulatory scheme of the RCCA would not apply.

[16] *See, e.g.*, Western Union International, Inc., File No. T-C-2528, released March 9, 1973, at para. 9. *See also* Uniform Settlement Rates on Parallel International Communications Routes, 84 FCC 2d 121 (1980).

pursuant to disparate protocols to communicate with one another. Pursuant to our *Computer II* decisions Western Union is free to offer these features as enhanced service outside of Title II regulation.

[17] In offering enhanced services over the transmission facilities for which it seeks Section 214 authorization, Western Union must adhere to the framework set forth in *Computer II* under which ". . . carriers that own common carrier transmission facilities and provide enhanced services, but are not subject to the separate subsidiary requirement, must acquire transmission capacity pursuant to the same prices, terms and conditions reflected in their tariffs . . ."[18] Thus, while Teletex and Telex service would be regulated as two separate and distinct basic services, Western Union may offer optional enhanced services on a detariffed basis utilizing these basic services.[19]

D. *Miscellaneous*

21. Western Union has already filed with the Commission a new tariff for Teletex (FCC No. 291) and has filed revisions to its tariffs for Telex Service (FCC No. 240) and International Telex Service (FCC No. 283). Western Union's proposed tariff provisions set forth charges to apply where a Teletex subscriber calls a Telex subscriber overseas. Although Western Union would impose a charge for the international component of the Telex call, it would not have a discrete charge for the domestic component of the Telex service. However, Telex is a record service subject to the RCCA and the interconnection requirements prescribed in the *Interim Order*. Under the *Interim Order*, Western Union is required to charge the domestic Telex component for domestic Telex service interconnected with its international services.

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[17] In our Computer II decisions we determined that "basic" services are common carrier communications services which would continue to be regulated under Title II of the Communications Act, but that "enhanced" services would not be subject to Title II regulation. In offering a basic transmission service, a carrier essentially offers a pure transmission capability over a communications path that is virtually transparent in terms of its interaction with supplied information. Services in which computer processing applications are used to act on the format, content, code, protocol or other aspects of supplied information are enhanced services. Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer II), 77 FCC 2d 384 (1980) (Final Decision), *reconsideration* 84 FCC 2d 50 (1980), *further reconsideration*, 88 FCC 2d 512 (1981), *aff'd sub nom.* CCIA v. FCC 693 F.2d 198 (D.C. Cir. 1982).

[18] Final Decision 77 FCC 2d 384, 475 (1980). *See also* Reconsideration 84 FCC 2d 50, 75 at n. 19 (1980).

[19] This regulatory structure of course applies solely to Teletex/Telex traffic originated in the United States. For Teletex/Telex service orginated in Germany, the German correspondent will provide the offering under the rules and policies of the Bundespost.

[20] Therefore, Western Union should withdraw its proposed tariff provisions and revise them to be consistent with the Commission's prescription in the *Interim Order*.

VI. *Conclusion*

22. We conclude that grant of Western Union's uncontested application will lead to greater consumer choice and likely result in downward rate pressure in substitutable data services. The regulatory structure which we have adopted for the proposed service is consistent with and will further the goals of the RCCA, our *Computer II* decisions, and our "non-exclusivity" policy.

23. In view of the foregoing, IT IS CERTIFIED, that the present and future public convenience and necessity require that the Western Union Telegraph Company establish, acquire and operate facilities for the purpose of providing Teletex within the United States and between the United States and Germany.

24. Accordingly, IT IS ORDERED, pursuant to Section 214 of the Communications Act, that Application File No. I-T-C-82-258 IS GRANTED, and that Western Union is authorized to:

a. lease from AT&T and operate four 56 kbps channels between an appropriate earth station on the east coast of North America and Western Union's New York operating office;

b. lease from AT&T and operate two voice-grade data channels between each of the following pairs of cities:

1.–Charlotte, N.C. and Atlanta, GA
2.–New Orleans, LA and Atlanta, GA
3.–Phoenix, AR and Los Angeles, CA
4.–Portland, OR and Seattle, WA
5.–Tulsa, OK and Kansas City, M

c. lease from RCA American Communications, Inc. and operate one satellite voice circuit between Miami, Florida and New York, New York;

d. lease from Comsat and operate four 56 Kbps satellite channels between the east coast earth station and an appropriate satellite over the Atlantic Ocean, connecting with similar channels between the satellite and an earth station in Germany, furnished by Western Union's correspondent in Germany;

e. utilize previously authorized Western Union facilities to derive the following voice-grade channels:

1.–Satellite Space

No. of Circuits	*Terminal Points*
6	Atlanta–New York
16	Chicago–New York
4	Dallas–New York
4	Los Angeles–New York

[20] *See* Western Union Telegraph Company, Mimeo 3100, released March 23, 1983 (Com. Car. Bur.) (Infocom/Infomaster 300/1200, Transmittal No. 8011), Petition for Reconsideration filed April 22, 1983.

2	San Francisco–New York
4	Seattle–New York

2.–Microwave

No. of Circuits	*Terminal Points*
2	Baltimore–New York
2	Boston–New York
2	Cincinatti–Chicago
2	Cleveland–Chicago
2	Denver–Chicago
2	Detroit–Chicago
2	Houston–Dallas
2	Indianapolis–Chicago
2	Kansas City–Chicago
2	Philadelphia–New York
2	Pittsburgh–New York
2	St. Louis–Chicago
2	Washington, DC–New York

f. acquire, install and operate additional multiplexed equipment for the facilities in e. above to derive voice-grade channels from these facilities; and

g. use said facilities to provide Teletex service between various points in the contiguous United States and Germany.

25. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to insure non-discriminatory use of, and equitable access to, the communications satellite system.

26. This authorization is effective on its release date and shall be continued year-to-year, beginning January 1, 1984, unless the Commission notifies the applicant to the contrary and requires a new application by December 1 of the current authorization term.

27. No material changes inconsistent with this or any other relevant Commission Order shall be made before final execution of an operating agreement between Western Union and its correspondent in Germany, and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

28. The authority granted herein is conditioned on compliance by Western Union and its affiliates with Commission policies on uniform settlement rates and exclusive service, facility and traffic arrangements.

29. Failure to decline the authorization as constituted, within 30 days of this Order, will constitute formal acceptance of the authorization as conditioned.

30. Except to the extent indicated herein, the conditions requested by WUI to be placed on Western Union's authorization ARE HEREBY DENIED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Intervention, Request for Denied

Petitioner to intervene was dilatory—he had four years to participate but declined to do so other than as a witness. He will not at this late stage be permitted to attempt to vindicate his private rights.
–WKKQ, Inc.
BC Docket No. 82–227

FCC 83R–37

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of WKKQ, INC. WKKQ, Hibbing, Minnesota For Construction Permit	BC Docket No. 82–227 File No. BP-780901AG

MEMORANDUM OPINION AND ORDER

(Adopted: May 11, 1983; Released: May 13, 1983)

BY THE REVIEW BOARD:

1. Two spurious and tardy pleadings have been filed which we will dismiss for the sound procedural reasons contained in the Mass Media Bureau's oppositions filed March 26 and April 6, 1983.

2. In an Initial Decision, FCC 83D-7, released February 4, 1983, Administrative Law Judge Walter Miller granted the application of Station WKKQ, which had sought to improve its facilities in 1977. A hearing was ordered because substantial factual questions had been raised about the accuracy, candor and validity of field strength measurements taken on behalf of WKKQ in May of 1977. *See Designation Order*, 47 Fed. Reg. 23559, published May 28, 1982. Although the ALJ promptly resolved all issues in favor of WKKQ, some of his findings were critical of the station's former consulting engineer who had taken the measurements.

3. On March 7, 1983, more than 30 days after the release of the Initial Decision, the consulting engineer, who had been a witness but not a party to the hearing, filed a petition for extraordinary relief in the nature of exceptions. The Mass Media Bureau filed an opposition which correctly points out that both the Communications Act and the Commission Rules, 47 USC 409(b) and 47 CFR 1.276(a) (1), provide that only a party may file exceptions to an Initial Decision.

Moreover, the consulting engineer had not sought to intervene in the hearing even though the Designation Order, *supra*, placed him on notice that his actions in taking the measurements were in issue in the case. Finally, the Bureau indicated that this is not the type of case which requires the Board to act on its own motion to vindicate the public interest. *See Hanover Radio, Inc.*, 91 FCC 2d 849 (1982); *GSM Media Corp.*, FCC 83R-29, released April 22, 1983, *recon. dismissed*, FCC 83R-34, released May 5, 1983.

4. On March 28, more than 50 days after the release of the Initial Decision, the consulting engineer filed a petition for leave to intervene and a request for oral argument on his "exceptions." In its opposition the Bureau pointed out that the Initial Decision had become final and effective with the passage of time by operation of the Commission's Rules, 47 CFR 1.276(d) and (e). Station WKKQ, in a statement filed April 1, made the same point. The Bureau also indicated that good cause had not been shown for the belated attempt by petitioner to intervene; indeed petitioner "admits in his petition that he *could have* timely filed such a petition but *chose* not to do so." (Bureau Opposition, pp. 3–4.)

5. Congress, the Courts, and the Commission have recognized that reasonable adherence to procedural rules in situations like the present one serves the public interest. See authorities discussed by Chief Judge Spottswood W. Robinson, III, in *Spanish International Broadcasting Co.* v. *FCC*, 385 F.2d 615, 626–628 (D.C. Cir. 1967). Since March 1979, petitioner has been on notice (Broadcast Bureau prehearing inquiry quoted in I.D., para. 18) that his measurement data raised substantial and material questions of fact. These questions eventually required resolution at hearing and have resulted in a seven-year delay before the applicant station could improve its facilities and bring better radio service to the listening public. At last on the threshold of success, WKKQ's proposal is again clouded by the efforts of petitioner, who is not dissatisfied with the grant to WKKQ but rather with subsidiary language in the Initial Decision pertaining to him. Petitioner has had four years to participate in this proceeding, but has declined to do so other than as a witness. At this late date, he will not be heard to claim the status of a party—intervention, exceptions, and oral argument—in order to attempt to vindicate his personal interests. Such dilatoriness cannot be tolerated. *Spanish International*, *supra*, 385 F.2d at 627–628. Adherence to basic procedural rules and sound administrative practice require that both pending petitions should be dismissed.

6. ACCORDINGLY, IT IS ORDERED, That the Petition for Extraordinary Relief, filed March 7, 1983, and the Petition for Leave to Intervene, filed March 28, 1983 by Robert A. Jones, ARE DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION
JOSEPH A. MARINO, *Chairman, Review Board*

FCC 83D–7

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of WKKQ, INC. WKKQ, Hibbing, Minnesota For Construction Permit	BC Docket No. 82–227 File No. BP-780901AG

Appearances

James P. Riley and *Thomas J. Dougherty, Jr.* on behalf of WKKQ, Inc.; *Richard C. Rowlenson, Arthur Stambler, Robert E. Kelly,* and *Joseph F. Hennessey* on behalf of Hibbing Broadcasting Company;[1] *Jerrold Miller* on behalf of Johnson, Johnson and Laidlaw (KNDK);[2] *Peter Tannenwald* and *Craig S. Iscoe* on behalf of witness Robert A. Jones; and *Arthur I. Steinburg* on behalf of Chief, Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE
WALTER C. MILLER

(Issued: January 27, 1983; Released: February 4, 1983)

Preliminary Statement

WKKQ, Inc. (WKKQ) presently operates an AM station in Hibbing, Minnesota on 1060 kHz, with 5 kW power, daytime only. It wants to change frequencies, increase power and become an unlimited time operation in the same community (1080 kHz, 5kW, 10 kW-LS, DA-N, U).

2. The Commission designated WKKQ's application for hearing on April 29, 1982 (see 47 F.R. 23559 published May 28, 1982).[3] The following interrelated issues remain to be resolved:

1. To determine the facts and circumstances surrounding the applicant's May 1977 field strength measurements.

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[1] These four attorneys were all members of the law firm of Lovett, Hennessey, Stambler and Siebert P.C. By letter dated December 22, 1982, that Firm withdrew as counsel for Hibbing Broadcasting Company. In that same letter Lovett, Hennessey, Stambler, and Siebert indicated that it wouldn't be filing either any Proposed Findings of Fact and Conclusions of Law or any Reply Findings in this proceeding.

[2] On September 28, 1982, Johnson, Johnson, and Laidlaw was granted permission to withdraw from this proceeding. See FCC 82M-3004.

[3] Why it took a month to get this designation order published in the Federal Register isn't clear.

2. To determine, in light of the evidence adduced pursuant to Issue 1, whether the applicant misrepresented facts or was lacking in candor with respect to its May 1977 field strength measurements.

3. To determine, in light of the evidence adduced pursuant to Issue 1, whether the applicant's May 1977 field strength measurements are valid.

• • •[4]

5. To determine, in light of the evidence adduced pursuant to the foregoing issues, whether a grant of this application would serve the public interest, convenience and necessity.

The burden of proceeding and the burden of proof under the foregoing issues is on WKKQ.

3. Prehearing Conferences were held on August 18 and September 24, 1982. Hearing Sessions were held on November 1 and 2, 1982. The evidentiary record was closed after the last hearing session. Both WKKQ and the Mass Media Bureau filed Proposed Findings of Fact and Conclusions of Law on January 7, 1983. No Reply Findings were filed.

Findings of Fact

The Events of May 20, 1977

4. Jerry J. Collins is the President and General Manager of WKKQ. At the time he determined to increase WKKQ's power, switch frequencies, and add nighttime operation, Collins retained Robert A. Jones, a consulting engineer in LaGrange, Illinois. It was Jones who was to prepare the engineering portion of the application and the accompanying engineering exhibits (WKKQ Ex. 6, p. 1).[5]

5. As previously noted (Footnote 4 *supra.*) one of the questions they faced was whether WKKQ's proposed operation would cause prohibited overlap to Station KNDK, Langdon, North Dakota. To obtain data on that question Jones decided that they should take field intensity measurements along the 284 ° and 295 ° radials from Station WKKQ. The purpose of such measurements was to ascertain the soil conductivity in the direction of co-channel KNDK (WKKQ Ex. 3, p. 2; Tr. 243–244, 248–249, 488–490).

6. Although he had never previously taken measurements on the 284 ° and 295 ° radials in the Hibbing area, about a week before the measurement undertaking, Jones sat down and *preselected* most of

[4] Issue 4 - a prohibited overlap issue was originally designated against WKKQ; i.e., whether WKKQ's proposed operation would cause prohibited overlap to KNDK, Langdon, North Dakota in violation of 47 CFR 73.37. On September 7, 1982, a Summary Decision resolved that issue in WKKQ's favor. See FCC 82M-2708.

[5] Previously, on several other occasions over a 20-year span, Collins has relied on Jones as his consulting engineer and he has never had occasion to doubt Jones' veracity, or the accuracy or reliability of his work (WKKQ Ex. 6, pp. 2, 4; Tr. 248, 484–488, 503–504, 516 and 564).

the measuring points and *preplotted* them on a U.S.G.S. topographic map.[6] He also preselected routes used to travel between measurement points and predetermined the order in which those points would be measured (Tr. 239–240, 250–256, 272).

7. Early on the morning of May 20, 1977, Jones took an airplane from Chicago, Illinois to Hibbing. He intended to complete the measurement undertaking in one day, although he was prepared to stay an extra day, if necessary (WKKQ Ex. 3, pp. 5, 27–28; Tr. 270–271, 501). Collins met him at the Hibbing airport somewhere between 9:00 a.m. and 9:30 a.m. (Tr. 271, 491).

8. Collins was to drive Jones to all but the close-in measurement points on the two radials. So they reviewed Jones' topographic map, and the general area they would be driving through, and Jones outlined the procedure he wanted Collins to follow. They then went to Station WKKQ where Jones verified the operation of the transmitter and the correct output power. Before they started the measurement undertaking, Jones told Collins that he wanted to complete the course in one day. Collins accepted this statement as a challenge and drove Jones through the course measured on May 20, 1977 as rapidly as he could (WKKQ Ex. 6, p. 1; Tr. 271, 491, 501, 502–506).

9. Jones took his first measurement at 10:20 a.m. and he continued to rapidly take measurements throughout the day. Putting drive time aside, Jones estimates that it only takes him about 10 to 12 seconds to take a single measurement.[7] (Tr. 263, 269). This includes lifting the meter cover, ensuring that the meter is in the linear mode, checking the battery by adjusting the switch, turning the switch to the field intensity mode, adjusting the receiver to receive the desired signal, calibrating position by adjusting a switch, calibrating the meter for maximum field strength, nulling the meter by adjusting a switch, moving a switch to the field intensity position, raising the meter for maximum signal reception, reading the field strength, and finally, nulling the meter by rotating it 90 degrees in order to check for reradiation (Tr. 86–88, 257–262).[8]

10. When they were still approaching each measuring point in

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[6] According to another WKKQ engineering consultant, John Heffelfinger, it's not good engineering practice to preselect and preplot most of your measuring points on a given radial. Heffelfinger's testimony on this point will be credited for the reasons he has given (Tr. 422–427). While the ALJ has no reason to doubt Jones when he says that he always prepares the map ahead of time (Tr. 250), it is held that it is a careless and risky practice that should be avoided (except on reruns) by a responsible engineering consultant.

[7] Jones modestly states that he is able to take a field intensity measurement faster than and as accurately as any other engineer he knows (WKKQ Ex. 3, p. 4; Tr. 263, 266–267, 269).

[8] Jones has testified regarding the measurement process that "you probably can do it in less time than it takes to describe how to do it" (Tr. 259). Although the Presiding Officer remains dubious that testimony will be credited.

Collins' car, Jones checked the radio frequency environment; i.e., he observed whether there was anything in the vicinity which could affect the accuracy of the reading. While taking each measurement Jones also checked the field intensity meter, looking for anomolies which might indicate a defective reading (WKKQ Ex. 3, pp. 5–6; Tr. 256, 269–271, and 277).

11. Jones acted as navigator during the measurement undertaking. Using the preplotted USGS map he selected the route that would be followed and directed Collins to each roadside measuring point. The weather conditions on May 20, 1977 were ideal and didn't inhibit the speed and accuracy of the measurement undertaking. The 284 ° and 295 ° radials traverse an area that is rural and devoid of fences, wires or other obstructions that may affect measurements in an urban area. Collins' average speed during the automobile portion of the measurement undertaking was something less than 51 miles an hour (WKKQ Ex. 3, pp. 5–6; Tr. 250, 256–257, 286, 492, 497, 500, 512).

12. The terrain in which the measurements were taken is relatively level. So when Jones got out of Collins' car he only had to walk ten to twenty feet to the point where he took his reading. Collins left the engine of the car running while Jones took his measurements. If needed he would turn the car in the direction of the next measurement point. Jones recorded his readings and made his notations (if any) after he got back into the car (WKKQ Ex. 3, pp. 5–7; Tr. 265, 276–277).

13. When he started taking the measurements Jones used his own wrist watch to ascertain and record the times the measurements were taken.[9] But after the measurement undertaking was partially completed Jones realized that his wrist watch was malfunctioning; i.e., he was recording inaccurate times. So he began to rely on Collins' watch. He would ask Collins for the time after returning to the car after taking a measurement. However, Collins' watch was running slower than his.[10] Consequently, the times Jones recorded with his own watch are not only suspect they do not correlate with the times he recorded using Collins' watch.[11] (Tr. 279–283, 288)

14. Jerry Collins is largely ignorant of engineering matters. He has no particular knowledge about the methods, techniques, and equipment used to take field measurements. So he didn't understand exactly what it was that Jones was doing with the meter. He had no

[9] 47 CFR 73.186(b) states that: "Complete data taken in conjunction with the field intensity measurements shall be submitted to the Commission in affidavit form including the following: (1) . . . the date and time of each measurement. . . ."

[10] Collins says his watch ran about 5 minutes slow a day (Tr. 499).

[11] Jones took the close-in measurements by himself; i.e., without Collins being present, on the afternoon of May 20, 1977. Jones claims he borrowed Collins' watch to record the close-in times. Collins can't recall that happening (Tr. 288, 498).

working knowledge of how to measure the field intensity of a transmitted signal. And he didn't observe what Jones was recording. Consequently his major role in the May 20th measurement undertaking was to do ail the driving to where Jones directed. While he also gave Jones the time at some of the measurement points, Collins wasn't aware that 47 CFR 73.186 requires that the measurement times be recorded and submitted to the FCC (WKKQ Ex. 6, p. 4; Tr. 492, 498, 504, 584–585; and Footnote 9 *supra*).

15. As previously noted (Footnote 5 *supra*), Collins has relied on Jones as a consulting engineer for a 20-year period. And he has never had occasion to doubt Jones' veracity or question the caliber of Jones' work (Tr. 484–489).

Events Surrounding June 16, 1977

16. After completing his May 20th, 1977 measurements, Jones returned to his home in LaGrange, Illinois. There he ostensibly[12] analyzed and prepared his engineering affidavit for submission to the Commission (see 47 CFR 73.186(b)). He submitted that affidavit on June 16, 1977. There he included the location number of the measurement, the time the measurement was taken, and the distance in miles, the measurement point is in miles from Station WKKQ's tower for each May 20, 1977 measurement (WKKQ Ex. 3, pp. 8, 10, 12; Tr. 228).

284° Radial			*295° Radial*		
Loc. No.	*Time*	*Dist. in Miles*[13]	*Loc. No.*	*Time*	*Dist. in Miles*[13]
101	4:30 p.m.	0.1	201	5:43 p.m.	0.1
102	4:33	0.2	202	5:39	0.2
103	4:36	0.3	203	5:36	0.3
104	4:39	0.4	204	5:33	0.4
105	4:42	0.5	205	5:30	0.5
106	4:45	0.6	206	5:27	0.6
107	4:48	0.7	207	5:24	0.7
108	4:51	0.8	208	5:21	0.8
109	4:54	0.9	209	5:18	0.9
110	4:57	1.0	210	5:15	1.0
111	10:20 a.m.	2.0	211	10:22 a.m	2.0
112	10:29	4.6	212	10:27	3.7
113	10:34	6.6	213	10:39	6.5

[12] The word "ostensibly" has been used because the Presiding Officer finds it hard to believe that a consulting engineer with Robert Jones' substantial experience, after analyzing the raw measurement data and the related material, would submit such slipshod engineering to the Commission. As will be described *infra*, Jerry Collins has been forced to go through an expensive and time-consuming hearing involving character allegations, not because of any wrongdoing on his part, but because his consulting engineer was willing to prepare and submit careless and uncraftsmanlike engineering to the Commission.

[13] "Dist. in Miles" is the straight-line distance from the measurement point to the WKKQ transmitter (Tr. 334).

284° Radial			295° Radial		
Loc. No.	*Time*	*Dist. in Miles*[13]	*Loc. No.*	*Time*	*Dist. in Miles*[13]
114	10:36	7.1	214	10:41	6.7
115	10:41	9.2	215	10:44	8.7
116	10:52	10.7	216	10:46	9.2
117	10:54	12.0	217	10:48	11.2
118	10:57	13.7	218	11:10	13.5
119	11:00	16.4	219	11:12	14.4
120	11:03	17.4	220	11:15	16.3
121	11:50	22.5	221	11:19	17.6
122	1:35 p.m.	29.6	222	11:23	18.7
123	3:10	34.3	223	11:33	20.8
124	2:15	38.6	224	12:30 p.m.	24.0
			225	1:00	27.7
			226	1:10	32.0
			227	2:50	34.4
			228	2:45	37.8
			229	2:40	40.5
			230	2:37	41.8
			231	2:32	44.6

17. Jones took the May 20, 1977, measurements in the following location number order: 111, 211, 212, 112, 113, 114, 213, 214, 115, 215, 216, 217, 116, 117, 118, 119, 120, 218, 219, 220, 221, 222, 223, 121, 224, 225, 226, 122, 124, 231, 230, 229, 228, 227, 123, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 210, 209, 208, 207, 206, 205, 204, 203, 202, 201 (WKKQ Ex. 3, pp. 8, 10, 12; Tr. 295–297).

The Commission's March 19, 1979 Letter

18. On March 19, 1979, the Commission expressed its dissatisfaction with Jones' field intensity measurement survey. In a letter signed by Jerrold L. Jacobs, then Chief, Broadcast Facilities Division, Broadcast Bureau, they said this:

> "Upon analysis of the submitted measurement data, we note the following: (1) the survey was conducted for distances of 38.6 miles along the 284 degree radial and 44.6 miles along the 295 degree radial and that every one of the measurements was made by a single individual; (2) the time intervals between several points appear to be unrealistically short and (3) the surveyor appeared at different locations simultaneously."

The Commission then indicated that it would withhold action on Collins' application so he could satisfactorily explain the discrepancies (HBC Ex. 1).

WKKQ's April 18, 1979 Response

19. On April 24, 1979, WKKQ forwarded its response to the Commission's March 19, 1979 letter. Attached to that response is a Statement from Robert A. Jones dated April 18, 1979 (WKKQ Ex. 3, pp. 31–33).

20. There Jones explained the discrepancies as follows:

"I object to the statement that 'the time intervals between several points appear to be unrealistically short'. There is no basis for such a statement and it completely ignores the logical facts. 1). I am an experienced field engineer, have taken and submitted similar measurements to the FCC for over 25 years. 2). I have a photographic memory and do not need to keep stopping to study road maps and hence require very little time to be so wasted. 3). I was driven by Mr. Jerry Collins, the Owner of WKKQ in his Corvette sports car. I thus had no time wasted in starting or stopping vehicles. 4). Mr. Collins lives 30 miles northwest of the station and travels many of these roads to and from to work and thus is even more familiar with the roads and the area than would any other driver I could have wished for. 5). As to the fact that two readings, #115 on the 284 ° and #214 on the 295 ° bearing were shown as taken at the same time, yes I know. They were of course not physically taken at the same time, but my watch stopped about then and we relied upon Mr. Collins' watch for the balance of the readings.[14] Since his watch showed 10:41 that was the time we recorded even though it was the same time shown for another measurement. Which watch was more correct is really unimportant since Section 73.186 does not require either the date or the times of field intensity measurements be submitted. . . ."[15]

21. Jones' explanation apparently didn't convince the Commission. For on April 29, 1982, it designated WKKQ's application for hearing. And it included issues that would permit an evidentiary inquiry into Jones' May 20, 1977 field intensity measurement survey (47 F.R. 23559, published May 29, 1982).

22. In the Designation Order the Commission further explained the problem. It said this:

". . . Field strength measurements are critical to many of our AM allocation decisions, and as with other applicant representations, we must be able to rely on the accuracy of the data submitted to us . . . The most suspicious measurements are apparently a series of thirteen made . . . between 10:44 and 11:23 a.m. (all presumably timed using Collins' watch), as follows:

Time	*Miles From WKKQ*	*Radial*
10:44	8.7	295°
10:46	9.2	"
10:48	11.2	"
10:52	10.7	284°
10:54	12.0	"
10:57	13.7	"
11:00	16.4	"
11:03	17.4	"
11:10	13.5	295°
11:12	14.4	"
11:15	16.3	"
11:19	17.6	"
11:23	18.7	"

[14] Collins can't verify that his watch was used "for the balance of the readings." See Findings 13–14 and Footnotes 10–11 *supra*.

[15] But see Footnote 9 *supra*. This contention is rejected. It strains credulity too far to believe that a consulting engineer with Robert Jones' measurement-taking experience didn't know 47 CFR 73.186's requirements. WKKQ's other consulting engineer, John Heffelfinger, is certainly aware of those requirements (Tr. 417–418).

. . . This tabulation indicates that in a period of 39 minutes WKKQ's engineer traveled over 21 miles and stopped to make 13 measurements. Considering the time that should have been spent assuring proper location of measurement points and accurate measurements, and allowing for roads that do not generally straight-line, point-to-point travel (so the distances traveled actually exceeded the straight-line distances shown above), it seems to us improbable that accurate measurements could have been made as reported . . . *There is therefore a substantial and material question that either the measurements were not made with sufficient care to assure their validity, or the measurements were not made as reported.* Hearing issues are thus required." (Underlining added.)

Postdesignation Activities

23. On May 15, 1982, Jones attempted to replicate certain of the May 20, 1977 measurements; i.e., those 13 measurements the Commission had referred to in its designation order. See Finding para. 22 *supra*. Collins again drove Jones to these measurement points and the same measurement-taking procedures were used that were employed in the May 1977 undertaking. The physical conditions for the measurement taking were essentially the same. This time Jones completed the 13 measurements in 37 minutes and 37 seconds (as compared with 39 minutes in May, 1977); however, Collins admits that he was anxious to drive *even faster* than he did the first time, and that his average speed of 51 miles per hour was faster than it was on May 20, 1977 (WKKQ Ex. 6, p. 3; WKKQ Ex. 23 - as corrected at Tr. 589; Tr. 288–292, 507–516, and 548).

24. A short time later, on June 2, 1982, Collins again tried to replicate the 13 measurements the Commission was concerned about - this time with Mark Persons.[16] While they didn't duplicate the May 1977 undertaking in every respect, they tried to go as rapidly as possible while allowing sufficient time for taking proper measurements (WKKQ Ex. 4, pp. 2–3; WKKQ Ex. 6, pp. 4–5; Tr. 88–89, 95, 105–109, 115–116, 119, 141–142, 155, 158 171).

25. Collins and Persons completed the 13 measurements in 44 minutes. However, between Location Nos. 120 and 218, Collins made a wrong turn. They estimate that they lost 2 minutes because of that. They claim that if they hadn't taken a wrong turn the total elapsed time would have been 42 minutes (WKKQ Ex. 4, pp. 3–4; WKKQ Ex. 6, p. 5; Tr. 107, 115–120, 172–174, 539–541, 568–569 and 583–584).

26. In addition, subsequent to designation, Collins commissioned a consulting engineer - John Heffelfinger - to take field intensity measurements and develop the facts on the prohibited overlap issue that the Commission had designated against WKKQ. Heffelfinger took those measurements between June 16–18, 1982.[17] Heffelfinger's

[16] Persons has worked as a radio engineer for 12 years. He holds a General Class license with Radar endorsement. He has taken field strength measurements without direct supervision on at least 9 radio stations and on at least 100 separate occasions over a period of 5 years. He has worked for WKKQ since July, 1978 (WKKQ Ex. 4, pp. 1–2; Tr. 95–96, 101–102, and 206–207).

thorough and craftsmanlike measurement survey was credited and the prohibited overlap issue was summarily resolved in WKKQ's favor (see FCC 82M-2708 released September 7, 1982 and Footnote 4 *supra*).

27. However, Heffelfinger also compared Jones' May 1977 measurements, Lysiak's June, 1982 measurements (see Footnote 17 *supra*), and his own June 1982 measurements on the 295 ° radial. This comparison shows a marked similarity in the "conductivity break" between miles 4 and 7, and miles 10 and 15; further each set of measurements shows a similar "clustering" of points about the 2 mmho/m conductivity wave (WKKQ Ex. 5, p. 2; Tr. 408–413).

28. Noting that the Commission's Figure M3 map shows a uniform soil conductivity along the 295 ° radial where the measurements were taken, Heffelfinger says it would have been "very difficult" for someone only looking at Figure M3 to have predicted the conductivity breaks and clustering at those distances. To do that, says Heffelfinger, a person would have had to take actual measurements (Tr. 412–413, 415–417).[18]

29. No other party to the proceeding offered any direct evidence[19] on Jones' May 20, 1977 measurement undertaking. Two FCC engineers arrived at WKKQ on June 16, 1982 to observe Mr. Heffelfinger perform his field intensity measurements. Collins offered to drive either one through the course of the 13 questioned measurements to witness the time involved, but both FCC engineers refused his offer[20] (WKKQ Ex. 6, p. 5; WKKQ Ex. 1, p. 5).

30. Hibbing Broadcasting Company (HBC) who throughout the hearing actively opposed a WKKQ grant (but see Footnote 1) claimed that it had two witnesses; i.e., a Mr. Vilah Brooks and Conrad Gabrielson, who had driven the route of the 13 disputed measurements to determine the amount of time required to complete these measurements. However, HBC introduced no evidence whatsoever on the subject (WKKQ Ex. 2, p. 3; HBC Ex. 3, pp. 4–5).

31. However, at the hearing, additional facts (in addition to Findings 4–30 *supra*) were developed about the times that Jones represented to the Commission those measurements were taken.

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[17] On June 16, 1982, Garrett Lysiak, EIC of the Commission's St. Paul, Minnesota District Office accompanied Heffelfinger. Lysiak also took measurements on the 295 ° radial. The Broadcast Bureau made Lysiak's measurements available to Heffelfinger (WKKQ Ex. 1, pp. 3, 8–10).

[18] Heffelfinger performed a similar type of comparison on the 284 ° radial measurements that he took in June, 1982 and Jones took on May 20, 1977. They too showed similar breaks in the conductivity at about the same distance (Tr. 462–467, 472–474).

[19] As opposed to evidence developed via cross-examination.

[20] This is strange. As noted this was one of the Commission's major concerns in this case. See Findings 19–22 *supra*. One would think that when FCC personnel were sent into the area that they would welcome any occasion to obtain relevant facts on the questions the Commission wanted answered.

32. First, and as previously noted,[21] Jones originally represented to the Commission that he was at Location point 115 on the 284° radial at 10:41 a.m., May 20, 1977. In the same affidavit he swore that he was at Location point 214 on the 295° radial at exactly the same time. Aside from his previous explanation that his watch was malfunctioning and that he then began recording the times that Collins gave him, Jones offered no further explanation.[22]

33. Next, in his May 20, 1977 affidavit Jones averred to the Commission that he was at Location point 216 on the 295° radial at 10:46 a.m. and at Location point 217 at 10:48 a.m. This representation is as false as the one set out in the previous paragraph. The running distance between Points 216 and 217 is 3.4 miles.[23] So even *assuming* that Jones' measurement time wasn't included in the two minutes (which it was) and further *assuming* that the distance between Points 216 and 217 is a straightline (which it isn't - see Footnote 23 *supra*), Collins would had to have driven his 1968 corvette at a speed of 102 miles an hour to go 3.4 miles in two minutes. That is simply unbelievable (Tr. 305–306; WKKQ Ex. 3, p. 20 and 23).[24]

34. Next, in his May 20, 1977 affidavit Jones claims he was at Location point 119 on the 284° radial at 11:00 a.m. and at Location point 120 at 11:03. The running distance between those two points is 3 miles. But they had changed directions at two different times at two different intersections to get from Point 119 to 120.[25] This means that Collins averaged 60 miles an hour over winding roads. While this isn't a physical impossibility, it certainly appears highly doubtful that he did so (WKKQ Ex. 3, p. 19, and 23).

35. Conversely, some of Jones' May 20, 1977 affidavit times present another type of problem. Keep in mind that both Jones and Collins have testified that Jones took all of his measurements as rapidly as possible so Jones could complete the measurements in one day;[26] also remember that Collins drove Jones through the measurement course as rapidly as he could (Findings paras. 8–12 *supra*).

36. Yet the record shows the following reported times:

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[21] See Findings 16, 18, 20, and 22 *supra*.

[22] As an experienced engineer Jones must have known at the time he submitted the data to the Commission that this physical impossibility would be challenged. Why Jones would nevertheless proffer such data without any explanation remains a mystery.

[23] The straight-line distance between those two points is two miles (WKKQ Ex. 3, p. 20).

[24] This time was ostensibly recorded after Jones began relying on Collins' timepiece. So he can't very well say the unbelievable readings were the product of his own malfunctioning wrist watch.

[25] The straight-line distance between Location points 119 and 120 is 1 mile (WKKQ Ex. 3, p. 19).

[26] Also keep in mind that Jones says that it only took him from 10 to 12 seconds to take a measurement (Finding para. 9 *supra*.).

(a) Jones and Collins ostensibly were at Location point 211 on the 295° radial at 10:22 a.m. They arrived at Location point 212 at 10:27 a.m. So it took them five minutes to travel no more than two miles. This would mean that Collins was driving the car at only 24 miles per hour. That doesn't harmonize with the record evidence (WKKQ Ex. 3, p. 20; Tr. 308–309);

(b) Jones and Collins ostensibly were at Location point 213 on the 295° radial at 10:39 a.m. and they arrived at Location point 214 at 10:41 a.m. So it took them two minutes to travel .4 of a mile. This would mean that Collins was driving the car at an average speed of only 12 miles per hour; that doesn't harmonize with the record evidence (WKKQ Ex. 3, p. 20; Tr. 310);

(c) Jones and Collins were ostensibly at Location point 215 at 10:44 a.m. They arrived at Location point 216 at 10:46 a.m. So it took them two minutes to travel .5 of a mile. This would mean Collins was driving the car at an average speed of only 15 miles per hour (WKKQ Ex. 3, pp. 20, and 23);

(d) Jones and Collins were ostensibly at Location point 219 on the 295° radial at 11:12 a.m. They arrived at Location point 220 at 11:15 a.m. Thus it took them three minutes to travel 1.3 miles. This means Collins drove the car at an average of 26 miles per hour (WKKQ Ex. 3, pp. 20 and 23); and

(e) Jones and Collins were ostensibly at Location point 220 at 11:15 a.m. They arrived at Location point 221 at 11:19 a.m. So it took them four minutes to travel 2 miles. This would mean that Collins was driving the car at an average speed of 30 miles per hour (WKKQ Ex. 3, pp. 20 and 23).[27]

37. Jones apparently realized that the data he submitted to the Commission was inaccurate, because at the hearing he admitted that any of the measurement times he submitted in his May 20, 1977 report could be off by as much as two minutes (Tr. 377–383).

Ultimate Findings and Preliminary Conclusions

1. The Commission has inquired into the facts and circumstances surrounding WKKQ Inc.'s (WKKQ's) May 1977 field strength measurement survey. They want to know whether WKKQ, when it submitted those measurements, misrepresented the facts to or lacked candor with the Commission. The Commission also wants to know if those May 1977 measurements are valid (Finding 2 *supra*).

Background

2. When Jerry J. Collins, WKKQ's President and General Manager, decided to increase WKKQ's power, switch frequencies, and add nighttime operation, he retained Robert A. Jones as his consulting engineer. Jones was to prepare the engineering portion of the application and the accompanying engineering exhibits (Finding 4 *supra*).

[27] At another point Jones' sworn testimony doesn't make sense. He states that the running distance between Location points 113 and 114 on the 284° radial is *less* than a half a mile, and that includes negotiating at least one turn (Tr. 309). However, according to the data Jones furnished the Commission on May 20, 1977 (WKKQ Ex. 3, p. 19) the straight-line distance between Location points 113 and 114 is exactly one-half mile.

3. One of the engineering questions WKKQ faced was whether its proposal would cause prohibited overlap to Station KNDK, Langdon, North Dakota. To obtain data on that question Jones decided that they would have to take field intensity measurements along the 284° and 295° radials from Station WKKQ (Finding 5 *supra*). He took those measurements on May 20, 1977. And after analyzing them he prepared and submitted an engineering affidavit to the Commission (Findings 16–17 *supra*).

4. After reviewing Jones' affidavit the Commission had cause to question the validity of his sworn data. They first noted that Jones had averred that he was at two entirely different measurement locations at exactly the same time. And the Commission further observed that the time intervals between several measurement points appeared to be unrealistically short (Finding 18 *supra*).

5. Jones tried to address the Commission's concerns (Findings 19–20 *supra*). But his response was unconvincing, and the Commission set the matter down for hearing. And they theorized that: (1) either the measurements hadn't been made; or (2) if they had been made they were not made with sufficient care to assure their validity (Findings 21–22 *supra*).

Were the May 20, 1977 Measurements Made?

6. There is no question. Jones took the 284° and 295° measurements on May 20, 1977 as he claims. These aren't "hotel room" measurements. On the morning of May 20, 1977 Jones traveled by airplane from Chicago to Hibbing. Jerry Collins met him at the airport. Except for the close-in measurements Collins used his car to drive Jones to the various measurement points. Since Jones had expressly indicated that he wanted to complete the measurement survey in one day, Collins drove Jones to the various measurement locations as rapidly as he could (Findings 8–12 *supra*).

7. Collins has testified that he observed Jones taking the measurements in question. There is no reason not to accept that testimony. In addition John Heffelfinger, another WKKQ engineering consultant, made an engineering comparison, and on the basis of that comparison properly concluded that Jones actually took the measurements on May 20, 1977, as he said he did (Findings 26–28 *supra*). So the first question that concerned the Commission (see Conclusion 5 *supra*.) is answered in WKKQ's favor.

Were the May 20, 1977 Measurements Made With Sufficient Care?

8. We have just concluded that Jones conducted a field intensity measurement survey on May 20, 1977. But determining whether Jones exercised sufficient care in making that survey (Conclusion 5 *supra*) is another matter entirely.

9. The record evidence clearly demonstrates that Jones failed to

conduct the May 20, 1977 measurements in a professional manner. He was far more interested in the speed with which the measurements were taken than he was in their accuracy. He was more anxious to complete the measurements in one day than he was in gathering accurate data to submit in his engineering affidavit to the Commission.

10. When he had partially completed his measurement survey Jones suddenly realized that his wrist watch was and had been malfunctioning, and that he had been recording inaccurate measurement times. Yet he never obtained an accurate timepiece and reran those measurements. He went right ahead and submitted them to the Commission representing them to be accurate time recordings (Finding 13 *supra*).

11. For example, in his engineering affidavit Jones represents that he was at two separate measurement points on two different radials at exactly the same time (Findings 18, 20, 22, and 32 *supra*). When confronted with this physical impossibility he claims that this was the point that he discovered his watch wasn't running properly and he began using Collins' watch to record his measurement times.

12. Assuming this explanation to be true, it still doesn't explain why - without any explanation whatsoever - he would proffer such conflicting data to the Commission. As an experienced engineer[28] he knew this physical impossibility would be challenged. Yet he went ahead and submitted it anyway.

13. Similarly, as the Commission suspected (Finding 18 *supra*) some of the time intervals between several of Jones' 1977 measurement points proved unrealistically short (Findings 33–34 *supra*). And conversely, at the hearing when he tried to explain those unrealistically short intervals away; that i.e., he was taking measurements as fast as possible so he could complete the entire undertaking in one day, several of the time intervals between his 1977 measurement points proved unrealistically long (Findings 35–36 *supra*).

14. In summary, Robert Jones did conduct a field intensity measurement survey on the 284° and 295° radials from WKKQ on May 20, 1977. But it was a poorly conducted survey fraught with inaccuracies. Jones was well aware that much of his survey data was less than accurate. But he nevertheless submitted it to the FCC in affidavit form. And when he was called upon to explain those inaccuracies his answer bordered on sheer arrogance (Finding 20 *supra*).[29] It was only after his client was thrown into hearing that

[28] For complete details on Jones' engineering experience see Mass Media Bureau Findings 7–9. As previously noted (Footnote 15 *supra*), Jones claims he didn't know 47 CFR 73.186 required him to record the time the measurement was taken. This claim is summarily rejected. Jones claims he has conducted allocation type field measurements on at least 280 occasions (WKKQ Ex. 3, pp. 1–2; Tr. 240, 245). It's inconceivable that he doesn't know what 47 CFR 73.186's requirements are.

[29] This assessment of Jones' engineering techniques is neither harsh nor isolated.

Jones was willing to admit that the measurement times he originally reported to the Commission could have been off by as much as two minutes (Finding 37 *supra*).

15. So it must be concluded that Robert Jones misrepresented the facts to the Commission about his May 20, 1977 field strength measurements; and the character issue 2 must be resolved adversely to WKKQ, Inc.[30]

16. Moreover, Jerry Collins - WKKQ's principal, President, and General Manager - is responsible for Jones' improprieties. Under the doctrine of *respondent superior* a principal is responsible for the acts of his agent performed within the scope of his employment. And this Commission has so held: *Eleven-Ten Broadcasting Corp.*, 32 FCC 706, 22 RR 699 (1962); *reconsideration denied* 33 FCC 92 (1962); *affirmed sub. nom. Immaculate Conception Church of Los Angeles, et. al.*, 116 U.S. App. D.C. 73, 320 F.2d 795 (1963), *cert. denied*, 375 U.S. 904; *KWK Radio, Inc.*, 34 FCC 1039 (1963), *reconsideration denied*, 35 FCC 561 (1963); *affirmed in KWK Radio, Inc.* v. *Federal Communications Commission*, 337 F.2d 540 (1964); and *Continental Broadcasting, Inc.*, 15 FCC 2d 120 (1968).

17. Having decided that Collins must bear responsibility for Jones' improprieties, we must decide whether Collins' application should be denied for that reason. It is concluded that Collins' (WKKQ's) application should not be denied. Jerry Collins is largely ignorant of engineering matters. He isn't well versed on the methods, techniques, and equipment used to take field measurements. So, on May 20, 1977, he properly relied on Robert Jones, his consulting engineer, to conduct a craftsmanlike field strength measurement survey. And when he drove Jones from measurement point to measurement point, as far as he (Collins) knew Jones was doing just that (Finding 14 *supra*).

18. Moreover, he had no reason to suspect that Jones would do anything less than a craftsmanlike job. He had employed Jones as a consulting engineer over a 20-year period, and had never had an occasion to doubt Jones' reliability in the past (Finding 15 and Footnote 5 *supra*).

19. In summary, Collins properly placed himself in the hands of

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See *Oil Shale Broadcasting Company*, FCC 83M-89 released January 10, 1983. There Jones' techniques were described as being ". . . contemptuous of the Commission's processes." Also see Tr. 146–282 of *Town and Country Broadcasting, Inc.*, BC Docket No. 81–802, where two Town and Country engineering exhibits prepared and submitted by Mr. Jones had to be withdrawn from evidence with the result that Mr. Jones' client failed to carry its burden of proceeding.

[30] While Issue 3 is also resolved against WKKQ, it has become irrelevant, since WKKQ (via a new engineering consultant, John Heffelfinger) took valid measurements on the 284° and 295° radials from Station WKKQ (Finding 26 *supra*).

a consulting engineer he believed was reliable. He could do no more. So while he must take responsibility for Jones' improprieties,[31] it is concluded that such improprieties don't detract from his (Collins') character qualifications to be a Commission licensee. See *Cumberland Broadcasting Corporation* v. *Federal Communications Commission*, 647 F.2d 1341 (1980).

20. One further observation is in order. When the Commission designated WKKQ, Inc.'s application for hearing back on April 29, 1982 (Finding 2 *supra*), Collins became aware that the Commission was seriously challenging Jones' May 20, 1977 field intensity measurements. He immediately hired another consulting engineer - John Heffelfinger - to take field intensity measurements and develop the facts on the prohibited overlap issue. So it can be further concluded that he moved in a timely and tactful manner to extricate himself from the tenuous position Jones had placed him in.

Ultimate Conclusion

21. Since it has been concluded that WKKQ, Inc. should not be disqualified for its former consulting engineer's improprieties; and since there are no other issues standing in the way of a grant of its application, it's now further concluded that a grant of WKKQ's application would serve the public interest, convenience and necessity.

SO, unless an appeal is taken from this Initial Decision or the Commission reviews it on its own motion,[32] WKKQ, Inc.'s application (File No. BP-780901AG) IS GRANTED subject to the following four conditions:

1. An antenna monitor of sufficient accuracy and repeatability, and having a minimum resolution of 0.1 degree phase deviation and 0.1 percent sample-current ratio deviation, shall be installed and continuously available to indicate the relative phase and magnitude of the sample current of each element in the array, to insure maintenance of the radiated fields within the authorized values of radiation.

2. A complete nondirectional proof of performance, in addition to the required proof on the directional antenna system, shall be submitted before program tests are authorized. The nondirectional and directional field strength measurements must be made under similar environmental conditions.

3. Upon receipt of operating specifications and before issuance of a license, permittee shall submit the results of observations made daily of the base currents and their ratios, relative phases, sample currents and their ratios, and sample-current deviations for each element of the array, along with the final amplifier plate voltage and current, the common-point current, and field strengths of each

[31] Had this been a comparative proceeding Collins would have been assessed a comparative demerit. See *James C. Sliger*, 70 FCC 2d 1565, 1574 at para. 16 (1979).

[32] If exceptions aren't filed within 30 days, or the Commission doesn't review the case on its own motion, the Initial Decision will become effective 50 days after its public release. See 47 CFR 1.276(d).

monitoring point for both nondirectional and directional operations for a period of at least 30 days, to demonstrate that the array will be maintained within the specified tolerances.

4. The inverse distance field intensity at a distance of one kilometer from the antenna in the directions specified shall not exceed the following values.

True Azimuth	*Maximum Field Strength (mV/m)*
91.5°	23.58
118.0°	23.61
157.0°	23.53
172.0°	23.51
192.0°	25.27
202.0°	23.98
212.0°	22.85
220.0°	23.01
227.0°	22.85
240.0°	28.97
266.0°	23.61
292.5°	23.58

FEDERAL COMMUNICATIONS COMMISSION
WALTER C. MILLER, *Administrative Law Judge*

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